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THE
CANADIAN RAILWAY ACT
1903

(ANNOTATED).

BY
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AND
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OF OSGOODE HALL, BARRISTERS-AT-LAW,

Editors of Canadian Railway Cases.

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PREFACE.

The necessity for a book of this character has arisen from the fact that no second edition of the late Mr. Abbott's valuable work on Railway Law has been published since its issue in 1896, and also from the radical changes effected in the Railway Act of Canada by the consolidation and amendments made in 1903. The present annotated edition of the Statute is offered to meet the evident demand for a book dealing with the changed conditions of modern railway legislation in Canada.

The authors are greatly indebted to Mr. J. Campbell Mac-Murchy, of Osgoode Hall, Barrister-at-law, for valuable assistance in the preparation of the work and during the period of its passing through the press.

THE CANADIAN RAILWAY ACT.

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THE CANADIAN RAILWAY ACT

(ANNOTATED).

INTRODUCTION.

When railways were first projected in Canada there was, of course, no general statute under which they could operate, and each railway that desired to exercise the power of eminent domain, to use fire and cross and run on highways, without being indicted for a nuisance, or to levy tolls for freight or passengers, and carry on any of the business incident to such companies was obliged to ask from Parliament such powers as were necessary for their organization, operation and maintenance and which were not expressly or impliedly conferred upon them by the common law. As all corporations apart from the privileges conferred on them by the Crown or Parliament by their charter had no greater rights than individuals, and, in many respects, their powers were much less, the result was that whenever a railway company was incorporated the act of incorporation embodied all the powers which it was thought the company would require and all such powers and all corresponding duties and liabilities imposed upon the company were to be found within the four corners of their act of incorporation and amending statutes.

Early instances of these special statutes are to be found in the Acts incorporating the Champlain and St. Lawrence Railroad (1832), 2 Wm. IV., cap. 58 (L.C.), (which is the earliest instance of Railway Legislation in Canada), the Cobourg Railroad Company, 4 Wm. IV., cap. 28, and the London and Gore Railway Company, 4 Wm. IV., cap. 29 (U.C.), which last is the original act of incorporation of the Great Western Railway Company, now part of the Grand Trunk Railway Company of Canada. The first of these Upper Canadian statutes contains twenty-four sections and the latter twenty-six; they both empower the

incorporators to hold real estate for the purposes of the railroad only, to construct "a double or single iron or wooden railroad or way," to carry "passengers, goods and property either in carriages used and propelled by the force of steam or by the power of animals or by any mechanical or other power, or by any combination of power" which the company might choose to employ.

In case of failure to agree with the landowners, either for land or damages, they were to proceed to arbitration.

They were authorized to explore the country along their intended right of way and to construct roads and bridges.

They were authorized to collect tolls "on all goods, merchandise and passengers using or occupying the said double or single iron or wooden railroad or way," and to "erect and maintain such toll houses and other buildings" as might be required for their business.

There were provisions made for the organization of the company and the rights and duties of shareholders, directors and officers, and for payment of dividends, and after a prescribed term of years (forty and fifty years respectively) the Crown was at liberty to assume possession upon payment to the shareholders of the par value of their stock plus a premium of twenty-five per cent. The Legislature reserved to itself the right to alter the charter, and fixed a limitation of six months within which actions must be brought for any damages done by reason of the railway. The Act incorporating the Champlain and St. Lawrence Railroad is much more elaborate in its provisions than the later Upper Canadian Statutes, and contains fifty-one sections laying down with a good deal of detail the duties and rights of the proprietors of the railroad. It also contains in section 2 a provision not in the early Upper Canadian Statutes that plans shall be made and the line laid out by a sworn surveyor and the plans filed in the office of the Prothonotary of the Court of King's Bench in the District of Montreal before the railroad may be operated. As mentioned later in this introduction similar provisions do not occur in the Cobourg Railroad, and London and Gore Railroad Acts, though they do occur in a much earlier Turnpike Act; the Act incorporating the Dundas and Waterloo Turnpike Company, 10 Geo. IV., cap. 15, sec. 2. But though these are perhaps the earliest statutes in Canada in which companies were incorporated for the purpose of constructing and operating railways

only, we have an earlier instance of a canal company being also authorized to construct a railway in the case of the Welland Canal Company, incorporated in 1824 by 4 Geo. IV., cap. 17, which was empowered to build two canals "with their necessary locks, towing paths, basins and railways"; and in this and other early Acts incorporating Bridge, Harbour and Canal Companies, we find the model for the early Railway Acts already mentioned.

It is interesting to note that all these early statutes conferring public franchises with their attendant powers of eminent domain contain substantially similar provisions for a reversion of the franchise to the Government, after terms of thirty, forty or fifty years. From these instances it is apparent that the principle of public ownership is no new thing in Canada; so also these statutes all have similar provisions for arbitration, for levying and collecting "tolls," for limiting the time within which actions for damages may be brought, and for the internal management of the company's affairs. Even the language of early railway acts is more applicable to canals than to railroads, as we understand them, for they contemplate the construction of a species of highway with "toll-houses" at certain points over which others may run their "carriages" upon payment of the prescribed "tolls." All this is still seen in the case of canals, but has become mere history in the case of railways. It is probably its descent from early Canals and Bridges Acts that has led to the retention of the term "tolls" as applied to freight charges in the Railway Act of 1903, Part II. For early instances of turnpike, canal, bridge and harbour charters see also the Acts respecting the Desjardins Canal Company (1826), 7 Geo. IV., cap. 18. The Cataragui Bridge Company (1827), 8 Geo. IV., cap. 12; the Cobourg Harbour Company (1829), 10 Geo. IV., cap. 11, and the Dundas and Waterloo Turnpike Company (1829), 10 Geo. IV., cap. 15.

It is to be noted, too, that while the earlier railway acts contain no provision for filing a plan, the last named Turnpike Company's Act provided that upon completion of the roads a plan made by a sworn surveyor was to be filed with the Clerk of the Peace before tolls could be collected.

From the years 1834 to 1851 the number of railway enterprises applying for incorporation became more and more numerous, and as business increased, and with it experience, the provisions which each company sought to have incorporated in its

charter greatly multiplied; and we find that in 1847 when the Legislature desired to incorporate even a comparatively short line, such as the St. Lawrence and Industry Village Railroad Company, which they did by 10 & 11 Vict., cap. 64, it required sixty clauses, contained in twenty-one large pages, to prescribe the necessary powers and obligations. By this time the English Railway Clauses Consolidation Act (1845), 8 Vict., cap. 20, and the English Lands Clauses Consolidation Act, 8 Vict., cap. 18, had been passed, and there was a demand in Upper and Lower Canada for some similar consolidation.

This matter and other railroad topics of general interest were referred to a Parliamentary Committee of which the Honourable W. B. Robinson was Chairman, and in a second report presented to the House on April 16th, 1846, printed as appendix R to the journals of the House for that year, that committee recommended that the English Act of 1845 be enacted in Canada with such changes as the circumstances of the country might require. They also submitted a draft set of standing orders which they considered should govern future applications to Parliament for incorporation. This report was submitted and the bill read a first time on April 16th, 1846 (Journals 1846, p. 100), and on April 29th 1846, it was ordered that it be read a second time on the 4th of May following (Journals, p. 181), but it was not then further proceeded with. In 1850, however, an Act was passed as 13 & 14 Vict., cap. 72, which extended to railroad companies the provisions of an Act passed in 1849 conferring general powers of construction and expropriation upon "Joint Stock Companies for the construction of roads and other works in Upper Canada." It was recited that this was done so as to encourage the "introduction of British capital and enterprises into this Province"; but it was not a success, for in a report to which we are about to refer more fully, Sir Allan Macnab, as Chairman, says: "The statute 13 & 14 Vict., cap. 72, allowing Joint Stock Companies to be formed for the construction of railways without special acts of incorporation has been brought under the notice of your committee. It is obvious that this Act if continued must greatly injure the progress and success of the principal railroad undertakings in the Province. No company will be found willing to risk their capital in an extensive line of railway so long as a private association have the right, without giving notices or granting compensation, to select the most favour-

able part of their route for the construction of a parallel and competing road, which after using the longer line to suit its convenience, may divert the trade just at the least expensive and most profitable portion of the line." This report is dated July 21st, 1851, and is to be found in Appendix U.U. of the Journals of the House for 1851. The whole report, with its schedules, is one well worthy of perusal by any one interested in the subject of railway legislation, and contains, amongst other things, a draft bill for an act to be known as the "Railways Clauses Consolidation Act," which though based upon the English Railways Clauses Consolidation Act (1845), is less elaborate in its provisions. This draft bill, after some amendments, was accepted by the House in the session of 1851, and became law on August 30th, 1851, as 14 & 15 Vict., cap. 51. The title of the act is "The Railway Clauses Consolidation Act," and it consists of twenty-two sections subdivided into numerous sub-sections. Though it has undergone many changes and received numerous additions, it may still be regarded as the parent statute upon which all subsequent consolidations have been modelled. The chief difference between this and the English Act of 1845 is that in England the powers of eminent domain conferred on all companies exercising public franchises were consolidated in a separate statute, known as the Lands Clauses Consolidation Act, 1845 (8 Vict., cap. 18), whereas the Canadian Act was in this and in all other respects self-contained and the powers and method of expropriation were in Canada comprised within the four corners of the Railway Act of 1851.

Historically the two Acts differ also in this, that while the English Act of 1845 is still law and has escaped many amendments, the Canadian Statute has been now consolidated six times and almost each year since 1851 has seen some change in, or departure from, the original provisions. In the Railway Act, 1903, only one hundred clauses of the Railway Act, 1888, have been re-enacted without amendment. As will be pointed out in the course of this work, however, the Canadian Act collects nearly all provisions applicable to Dominion railways, whereas in England separate statutes have been passed to deal with the various phases of their organization, construction and operation. The English Statutes are collected in Browne and Theobald on Railways, 3rd edition, and it is not necessary to deal particularly with them in this introduction.

After the passing of the Statute 14 & 15 Vict., cap. 51, there was some agitation for the better protection of life upon railways and, accordingly, the Statute 20 Vict., cap. 12, entitled "An Act for the Better Prevention of Accidents on Railways" was passed; and this statute added some twenty-two provisions to the General Act, most of which are still to be found, though in an altered condition, in the Railway Act of 1903.

Owing to its remedial nature, its clauses received a favourable construction from the courts and it was the aim of the judges to give a liberal interpretation to its provisions where they were the subject of judicial consideration. See, for instance, the judgment in *Markham v. Great Western R.W. Co.*, 25 U.C.R. 572, at pages 575 and 576. This statute with other amendments to the General Act was consolidated in 1859 and became chapter 66 of the Consolidated Statutes of Canada, 1859, which, of course, repealed all previous legislation. Some amendments to this last named Act were made from time to time, but it remained in force within the Provinces of Upper and Lower Canada until Confederation; even after Confederation it retained its validity in the Provinces of Ontario and Quebec, until it was subsequently consolidated and repealed by the Legislatures of those Provinces, and it is still to be found with comparatively few changes, in the Ontario Railway Act of 1897, R.S.O. cap. 207.

Upon Confederation it became necessary to enact a new statute which would be applicable to all railways within the jurisdiction of the Parliament of Canada under section 92, sub-section 10 of the British North America Act, and accordingly on May 22nd, 1868, a statute was enacted as 31 Vict., cap. 68 (Dom.), which was called "The Railway Act of 1868," and which consolidated (with some changes, however) most of the provisions of C.S.C., cap. 66, and its subsequent amendments.

By 1879, however, some ten statutes had been passed amending this General Railway Act, and it was deemed advisable to again consolidate its provisions, which was done by "The Consolidated Railway Act, 1879," passed on May 15th, 1879, as 42 Vict., cap. 9. This consolidated statute, with the amendments made by 44 Vict., cap. 24, 46 Vict., cap. 24, 47 Vict., cap. 11, and 49 Vict., cap. 25, sec. 30, took its place in the Revised Statutes of Canada, 1886, as chapter 109. This last statute was amended by 50 and 51 Vict., cap. 19, and with this amendment and

some further changes, particularly in the arrangement of the sections, was consolidated and re-enacted in 1888 as 51 Vict., cap. 29, under the title "The Railway Act." From that date to the present time this last named statute, with its eleven amending statutes, has embodied most of the statute law affecting railways subject to the jurisdiction of the Parliament of Canada.

Recently the desire for a better control of freight charges made by railway companies has led to a demand to further legislation on this topic, and, no doubt, the opportunity was seized to amend and consolidate all the provisions of the Act. The clauses affecting freight rates were made the subject of two valuable reports submitted by Professor S. J. McLean, Ph. A., M.A., to the Honourable A. G. Blair, then Minister of Railways and Canals, the first dated February 10th, 1899, entitled "Reports upon Railway Commisisions, Railway Rate Grievances and Regulative Legislation," and the second dated January 17th, 1902, entitled "Rate Grievances on Canadian Railways." These reports were printed as sessional paper No. 20 A of the session of 1-2 Edw. VII., and were also circulated in pamphlet form. They recount the difficulties which had been met with in attempting to deal with this complicated subject, and suggest the appointment of a Railway Commission to take the place of the previous body exercising jurisdiction over railways and known as the Railway Committee of the Privy Council. Professor McLean also draws the following conclusions from the discussion of the subject appearing in the reports:

1. There must be great care in the definition of the powers conferred upon the commission.
2. The matters to be dealt with are concerned with administration and policy rather than formal judicial procedure.
3. Subject to an appeal to the Governor-in Council the decision of the Commission should be final.
4. There should be requirements in regard to technical qualifications for office; one Commissioner should be skilled in law, and one in railway business.
5. The Commissioners should hold office on the same tenure as the judges.

It may be interesting to see how far these conclusions have been adopted by the present statute. The extent to which they have been followed will more clearly appear from the discussion

of the sections themselves, but the following summary of the provisions respecting the Railway Commission, its constitution, jurisdiction and general powers may serve to show at a glance how far the present statute conforms to these conclusions.

1. The powers conferred upon the Board are laid down with considerable detail, though nothing but actual experience and a reference to decisions upon similar problems in other countries will show how far the present statute will require amendment in that respect. It may, however, be said that we have never before in Canada had such ample machinery provided for dealing with disputes arising out of the operation of railways. The adoption by the Railway Commissioners of proper regulations governing their procedure would no doubt render valuable assistance in defining their powers and duty. The statute permits the Commissioners to frame such rules as they see fit.
2. The statute substantially recognizes that the matters to be dealt with are not so much matters of "formal judicial procedure" as matters "concerned with administration and policy": its orders are not matters of record, but may be made a rule of a Court of Record (sec. 35), and it may act on its own initiative (sec. 24). It is also empowered to grant leave to appeal on questions of law to the Supreme Court of Canada (sec. 44, sub-sec. 3). The list of matters other than freight rates with which it is empowered to deal by section 25 are all matters of general railway policy as distinguished from matters of law.
3. The right of appeal from any decision of the Commission is limited to the Governor-in-Council (sec. 44), except upon questions of law as already mentioned, and except where the jurisdiction of the Board is attacked (sec. 44, sub-sec. 3).
4. No requirements in regard to the technical qualifications of Commissioners are laid down by the Act, but no doubt such considerations will have weight in making any appointments as Commissioners.
5. Each Commissioner is to hold office for ten years, subject, however, to the right of the Governor-in-Council to re-

move him for cause. On the expiration of his term he is eligible for reappointment, but must retire when he reaches the age of seventy-five.

The new statute was drawn up and presented to Parliament during the session of 1902, but was not proceeded with. It was redrawn and again submitted in 1903, and after many changes in the committees of both Houses, was again recast and enacted as The Railway Act, 1903, 3 Edw. VII., cap. 58 (D.).

It should be noted that while previous consolidations of the Railway Act were only made applicable, as to most of their provisions, to railways constructed after the passing of the Acts, the Consolidated Railway Act of 1879 was in effect made applicable to all railways constructed or to be constructed under any Act passed by the Parliament of Canada; and while for some time the other railroads, such as the Great Western Railway Company, operated under the clauses of their Special Act and were not liable in all respects to the General Railway Act of Canada, they have in the course of time by clauses inserted in amendments to their charters, or by judicial decision, or by express enactment by the Parliament of Canada become liable to all the provisions of the Consolidated Act, so that, speaking broadly, it may now be affirmed that for all general purposes the Railway Act of 1903 will apply to every railway subject to the jurisdiction of the Parliament of Canada, no matter how much their original charters may antedate general railway legislation (see post sec. 3). Previous to the Statute 38 Vict., cap. 24 (Dom.), this could not be said of all railways as regards the contracts for the carriage of goods which they might make, but by section 4 of that statute the general provisions of the Railway Act governing such contracts were expressly made applicable to every railway previously incorporated (see *Scott v. Great Western R.W. Co.*, 23 U.C.C.P. 182; *Allan v. Great Western R. W. Co.*, 33 U.C.R. 483, and *Scarlett v. Great Western R.W. Co.*, 41 U.C.R. 211).

3 EDWARD VII.

CHAPTER 58.

(*And amendments thereto.*)

An Act to amend and Consolidate the Law Respecting Railways.

[*Assented to 24th October, 1903.*]

His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

I.—SHORT TITLE.

1. This Act may be cited as *The Railway Act, 1903.*

Short
title.

In the Statute 14 & 15 Vict., cap. 51, sec. 2, this Act was described as The Railway Clauses Consolidation Act. In the consolidation of 1879, 42 Vict., cap. 9, sec. 1, it was described as The Consolidated Railway Act, 1879. In the other consolidations, C.S.C., cap. 66, 31 Vict. (D.), cap. 68, R.S.C., cap. 109 and 51 Vict. (D.), cap. 29, it was described as The Railway Act.

II.—INTERPRETATION.

2. In this Act, and in the Special Act incorporating any railway company to which this Act, or any part thereof, applies, unless the context otherwise requires,—

Interpre-
tation.

(a.) The expression “Board” means the “Board of Railway Commissioners for Canada”;

The first Board of Railway Commissioners was appointed by 14 & 15 Vict., cap. 73, sec. 17, which was an Act for the construction of a main trunk line through the Provinces of Upper and Lower Canada and connecting with a proposed railway through Nova Scotia and New Brunswick. By that section the Receiver-General, Inspector-General, Commissioner and Assistant Commissioner of Public Works, and Postmaster-General were ap-

pointed a Board of Railway Commissioners for the purpose of supervising the carrying out of this work in Canada. By 20 Vict., cap. 12, they were afterwards appointed to supervise the carrying out of the provisions of that statute regarding the safety of passengers and prevention of accidents on railroads and their appointment was continued for similar purposes by C.S.C., cap. 66. Upon Confederation the tribunal described as the Railway Committee of the Privy Council was substituted for the Board of Railway Commissioners. See 31 Vict., cap. 68, sec. 23 (D.). The Railway Committee continued to exercise supervision over Dominion railways under consolidations subsequent to Confederation until the enactment of the present statute.

“By-law” (b.) The expression “by-law,” when referring to the act of the company, includes a resolution;

This should be read with the Interpretation Act, R.S.C., cap. 1, sec. 7 (45), which provides that wherever power to make by-laws, regulations, rules or orders is conferred it shall include the power from time to time to alter or revoke the same and make others.

See sections 243 and 251, *infra*, for regulations respecting the making of by-laws.

Under 59 Vict., cap. 9, sec. 2 (D.), all resolutions passed instead of by-laws under section 58 of 51 Vict., cap. 29 (D.), were declared to be valid and were confirmed, and this section is not repealed by the present Act; see section 310, *infra*.

“Company.” (c.) The expression “company” means a railway company, and includes any person having authority to construct or operate a railway;

Formerly 51 Vict., cap. 29, sec. 2(a). See 8 Vict., cap. 20, sec. 3 (Imp.), 17 & 18 Vict., cap. 31, sec. 1 (Imp.), 30 & 31 Vict., cap. 127, sec. 3, and 31 & 32 Vict., cap. 119, sec. 2.

Compare with this definition the definition of “company” in sec. 302, *infra*, from which it would appear that sec. 2(c) is intended to apply only to companies within the jurisdiction of the Dominion Parliament.

“Costs.” (d.) The expression “costs” includes fees, counsel fees, and expenses. (New.)

This definition refers especially to sec. 162, *infra*.

(e.) The expression "county" includes any county, union of "County." counties, riding, or like division to that of a county in any province, or in the Province of Quebec, any division thereof into separate municipalities;

Formerly 51 Vict., cap. 29, sec. 2(b).

See also Interpretation Act, R.S.C., cap. 1, sec. 7 (20), by which is provided that a county shall include two or more counties united for purposes to which the enactment relates.

(f.) The expression "court" means a superior court of the "Court." province or district;

Formerly 51 Vict., cap. 29, sec. 2 (c).

(g.) The expression "Exchequer Court" means the Ex- "Ex-
chequer Court of Canada. (New.) chequer
Court."

(h.) The expression "goods" includes personal property of "Goods." every description that may be conveyed upon the railway, or upon steam vessels, or other vessels connected with the railway;

Formerly 51 Vict., sec. 2 (f) amended. The same word is defined in the English Acts, 8 Vict., cap. 20, sec. 3, from which the definition in 51 Vict., cap. 29, (D.), sec. 2(f) was taken. Compare the definition of the word "merchandise" in the English Act, 51 & 52 Vict., cap. 25, sec. 35. Presumably this definition of the word "goods" would apply as well to passengers' luggage and cattle which occurred in the English definition of the word "traffic" in 17 & 18 Vict., cap. 31, sec. 1, and 36 & 37 Vict., cap. 48, sec. 3. See *The Queen v. Slade*, 21 Q.B.D. 433, and *McCormack v. Grand Trunk R. W. Co.*, 3 Can. Ry. Cas. 185.

(i.) The expression "highway" includes any public road, "High-
street, lane or other public way or communication; way."

Formerly 51 Vict., cap. 29, sec. 2(g). No similar definition appears in the English Railway Acts.

In the *Township of Gloucester v. Canada Atlantic R.W. Co.*, 1 Can. Ry. Cases 327, page 331, Lount, J., says: "The defendants say that by this interpretation and the construction to be

placed upon it by the section of the Act where the word 'highway' is used the proper meaning to be given is 'A public road opened up and in actual use by the public' and not an unopened road. I do not see why this restricted meaning should be adopted, more especially as the word 'highway' *includes* any public road, street, lane or other public way or communication. I think it must be conceded that Parliament intended to give and did give, to the word 'highway' a full and not a limited meaning."

Therefore he holds that an unopened road allowance is a public highway within the meaning of this section; but it does not include a road merely shown on a plan registered by a private owner and not opened up or adopted by the municipality. *City of Toronto v. Grand Trunk R.W. Co.*, 2 O.W.R. 3, nor a mere "trail" or "way" which is not a public highway as of right: *Royle v. Canadian Northern R.W. Co.*, 3 Can. Ry. Cas. 4.

"Inspecting engineer."

(j.) The expression "inspecting engineer" means an engineer who is directed by the Board, or by the Minister, to examine any railway or works, and includes two or more engineers when two or more are so directed;

Formerly 51 Vict., cap. 29, sec. 2(h).

"Judge."

(k.) The expression "judge" means a judge of a superior court;

Formerly sec. 2 (i).

"Justice."

(l.) The expression "justice" means a justice of the peace acting for the district, county, riding, division, city or place where the matter requiring the cognizance of a justice arises, and who is not interested in the matter; and when any matter is authorized or required to be done by two justices, the expression "two justices" shall be understood to mean two justices assembled and acting together;

Formerly section 2(j).

"Lands."

(m.) The expression "lands" means the lands, the acquiring, taking or using of which is incident to the exercise of the

powers given by this or the Special Act, and includes real property, messuages, lands, tenements and hereditaments of any tenure;

Formerly 51 Vict., cap. 29, sec. 2(*m*).

For the English definition see 8 Vict., cap. 18, sec. 3 (Imp.), and 8 Vict., cap. 20, sec. 3 (Imp.). In England this definition includes sub-soil where there is an authority in a special act to take the sub-soil without appropriating the surface. *Farmer v. Waterloo and City R.W. Co.* (1895), 1 Ch. 527. It is said in Browne and Theobald, 3rd Edition, page 134, that it also includes an easement, but in *Re Metropolitan District R.W. Co. and Cosh*, 13 Ch. D. 607, at page 616, Jessel, M.R., states that it does not include an easement and the promoters have no right to require landowners to sell them a mere easement in the land, considered *Midland R.W. Co. v. Wright* (1901), 1 Ch. 738. See also *Great Western R.W. Co. v. Swindon, etc., R.W. Co.*, 22 Ch. D. 677, 9 A.C. 787, where the question was much discussed, but no definite decision came to. Where the railway is empowered by a special act to take an easement, this word may then be read into the words "lands." *Hill v. Midland*, 21 Ch. D. 143. Under the English Act "lands" also includes minerals. *Errington v. Metropolitan District R.W. Co.*, 19 Ch. D. 559.

(*n*.) The expression "lease" includes an agreement for a ⁵/₂ "Lease." lease;

Formerly 51 Vict., cap. 29, sec. 2(*l*). Compare 8 Vict., cap. 18, sec. 3 (Imp.).

(*o*.) The expression "Minister" means the Minister of Rail- "Minis-
ways and Canals; ter."

Formerly 51 Vict., cap. 29, sec. 2 (*m*). The powers of the Minister of Railways and Canals are defined by R.S.C., cap. 37.

(*p*.) The expression "owner," when, under the provisions of "Owner." this Act or the special Act, any notice is required to be given to the owner of any lands, or when any act is authorized or required to be done with the consent of the owner, means any person who, under the provisions of this Act, or the Special Act

or any Act, incorporated therewith, would be enabled to sell and convey lands to the company;

Formerly 51 Viet., cap. 29, sec. 2 (*p*). Compare 8 Viet., cap. 18, sec. 3 (Imp.).

The term "owner" in sec. 76 of 8 Viet., cap. 18, (Imp.), is said to contemplate any person having some title to the lands. See Browne and Theobald, p. 193, and cases there cited for decisions upon the English Act. Under the decisions of *Re Canadian Pacific R.W. Co. and Batter*, 1 Can. Ry. Cases 457; *Young v. Midland R.W. Co.*, 19 A.R. 265, affirmed *Midland R.W. Co. v. Young*, 22 S.C.R. 190, and *Re Belt Line R.W. Co.*, 26 O.R. 413, and *Re Toronto, Hamilton & Buffalo R.W. Co.*, and *Burke*, 27 O.R. 690, it may be said that all parties interested in the lands may be treated as the owner for the purpose of compensation under the statute, and the term is not to be understood in the limited sense of this interpretation clause, but in its natural and ordinary sense. See per Osler, J.A., *Young v. Midland R.W. Co.*, *supra*, at p. 275. And though the title of the person in possession might be defective the railway company may not ignore it so as to justify an entry on the lands he occupies without his consent and without giving him the notices and taking the other steps prescribed by the Act.

Stewart v. Ottawa & New York R.W. Co., 30 O.R. 599.

This matter is fully discussed in the notes to *Re Canadian Pacific R.W. Co. and Batter*, 1 Can. Ry. Cases, at pp. 484, 485 and 486.

"Plan." (q.) The expression "plan" means a ground plan of the lands and property taken or intended to be taken;

Formerly 51 Viet., cap. 29, sec. 2 (*m*), where the words defined were "map or plan."

"Provincial legislature." (r.) The expression "legislature of any province" or "provincial legislature" means and includes any legislative body other than the Parliament of Canada. (New.) -

"Railway" (s.) The expression "railway" means any railway which the company has authority to construct or operate, and includes all branches, sidings, stations, depots, wharfs, rolling stock,

equipment, stores, property real or personal and works connected therewith, and also any railway bridge, tunnel, or other structure which the company is authorized to construct;

Taken from 55 & 56 Viet., cap. 27 (D.). Compare 8 Viet., cap. 20 sec. 3 (Imp.), 35 & 36 Viet., cap. 50, sec. 2 (Imp.), and 36 & 37 Viet., cap. 48, sec. 1 (Imp.) Under the English Employers' Liability Act it has been held that a railway includes a tramway upon the public road. *Fletcher v. London United Tramways Limited* (1902), 2 K.B. 269.

But under the British Columbia Railway Act, 1890, sec. 38, it was held that a tramway was a railway within the meaning of that Act. *Edison General Electric v. Edmonds*, 4 B.C.R. 354.

Under the English Railway and Canal Traffic Act, 1888, 51 & 52 Viet., cap. 25, sec. 25, a dock company having sidings within the area of its own property only was held not to be a railway. *London & India Dock Co. v. Great Eastern R.W. Co.* (1902), 1 K.B. 568. And lines, sidings and platforms inside a company's premises and freight sheds were held not to be part of lands used for a railway within the meaning of a Municipal Assessment Act. *Williams v. London & North Western R.W. Co.* (1899), 2 Q.B. 197, (1900), 1 Q.B. 760.

It has been held that the term "railway" by itself includes all works authorized to be constructed and therefore includes stations. *Cotter v. Midland R.W. Co.*, 5 R.C. 187, at p. 194; but in England it was held that the term railway under sec. 92 of 8 Viet., cap. 20 (Imp.), did not include a station. *Midland R.W. Co. v. Ambergate R.W. Co.*, 10 Hare 348. In view, however, of the express insertion of the word "stations" in the definition given in the present Act such an Act as this would not apply in Canada.

A mining company empowered to build a railroad as well has been held to be a railway in Nova Scotia for the purpose of obtaining the benefit of an exemption from taxation, so far as the railway portion of its works is concerned. *International Coal Co. v. Cape Breton*, 22 S.C.R. 305; and for some purposes even private owners of a railway on their own property may come within the term: *Cooper v. Hamilton, etc., Co.*, 8 O.L.R. 353.

"Rolling stock." (t.) The expression "rolling stock" means and includes any locomotive, engine, motor car, tender, snow plough, flanger, and every description of car or of railway equipment designed for movement on its wheels, over or upon the rails or tracks of the company. (New.)

Compare 30 & 31 Vict., cap. 127, sec 4 (Imp.).

"Secretary." (u.) The expression "Secretary" means the Secretary of the Board. (New.)

"Sheriff." (v.) The expression "sheriff" means the sheriff of the district, county, riding, division, city or place within which are situated any lands in relation to which any matter is required to be done by a sheriff, and includes an under sheriff or other lawful deputy of the sheriff;

Formerly 51 Vict., cap. 29, sec, 2 (s).

"Special Act." (w.) The expression "Special Act" means any Act under which the company has authority to construct or operate a railway, or which is enacted with special reference to such railway, and includes all such Acts; and where such authority is derived from any letters patent granted under any Act, such letters patent shall be deemed to form part of such Act;

See 51 Vict., cap. 29, sec. 2 (t), which has been amended by the addition of the words "And where such authority is derived from any letters patent granted under any Act such letters patent shall be deemed to form part of such Act."

In view of the provisions of the Canada Joint Stock Companies Act, 2 Edw. VII., cap. 15, sec. 5 (D.), prohibiting the issue of Letters Patent by the Secretary of State for the incorporation of railway companies, it is not at once clear why these words were inserted, unless it be to cover such street railways or electric railways as may, under provincial legislation be incorporated by Letters Patent, but which may under section 7, *infra*, become subject to the provisions of this statute for certain purposes.

For the English definition of the term "Special Act," see 36 & 37 Vict., cap. 48, sec. 2 (Imp.).

(x.) The expression "toll" or "rate" means and includes "Toll." any toll, rate or charge made for the carriage of any traffic, or for the collection, loading, unloading or delivery of goods, or for warehousing or wharfage, or other services incidental to the business of a carrier;

Formerly 51 Vict., cap. 29, sec. 2 (*u*), amended by the insertion of the word "rate," which did not appear in the original section, and by leaving out the word "cording" after "unloading" in the 3rd line.

Compare the English definition in 8 Vict., cap. 20, sec. 3 (Imp.).

(y.) The verb "charge," when used with respect to tolls, "Charge." means and includes to quote, charge, demand, levy, take or receive;

(z.) The expression "traffic" means and includes passengers, "Traffic." goods and rolling stock;

See 51 Vict., cap. 29, sec. 2(*v*), amended.

In view of the definition of rolling stock given in this Act for the first time it was evidently not necessary to define the term "traffic" with as much detail as in the previous Act. The result of the amendments, however, has been to make no provision for the inclusion of cattle except by classing them under the expression "goods" as defined by sec. 2(*h*) *ante*.

Compare 17 & 18 Vict., cap. 31, sec. 1 (Imp.), and 36 & 37 Vict., cap. 48, sec. 3 (Imp.).

(aa.) The expression "train" includes any engine, locomotive "Train." or other rolling stock;

In *Hollinger v. Canadian Pacific R.W. Co.*, 21 O.R. 705, it had been already held that an engine with tender moving reversely is a "train of cars" within the meaning of sec. 260 of 51 Vict., cap. 29, now sec. 228, *infra*.

This was affirmed 20 A.R. 244. In *Casey v. Canadian Pacific R.W. Co.*, 15 O.R. 574, it was thought, though not definitely decided that an engine and tender would under the corresponding section of R.S.C., cap. 109, be a "train of cars." The definition furnished by the above clause sets at rest any doubt that might previously have existed.

"Under-
taking."

(bb.) The expression "the undertaking" means the railway and works, of whatsoever description, which the company has authority to construct or operate;

Formerly 51 Viet., cap. 29, sec. 3 (*w*). In England where a mortgage of the "undertaking" is given it means the undertaking as a going concern and the management cannot be interfered with by the mortgagees. *Gardner v. London, Chatham & Dover R.W. Co.*, L.R. 2 Ch. 201. See *Wheatley v. Silkstone, etc., Co.*, 29 Ch. D. 715.

No definition of the term appears in the English Railway Acts. In *Phelps v. St. Catharines and Niagara Central R.W. Co.*, 18 O.R. 581, it was said that "in railway parlance the undertaking has been defined to mean the complete work from which returns of money or earnings arise," see 19 O.R. 501. See also *Drummond v. South Eastern R.W. Co.*, 24 L.C. Jur. 276.

"Work-
ing ex-
pendi-
ture."

(cc.) The expression "working expenditure" means and includes all expenses of maintenance of the railway, and all such tolls, rents or annual sums as are paid in respect of property leased to or held by the company, apart from the rent of any leased line, or in respect of the hire of rolling stock let to the company; also all rent charges or interest on the purchase money of lands belonging to the company, purchased but not paid for, or not fully paid for; and also all expenses of or incidental to working the railway, and the traffic thereon, including all necessary repairs and supplies to rolling stock while on the lines of another company; also rates, taxes, insurance and compensation for accidents or losses; also, all salaries and wages of persons employed in and about the working of the railway and traffic; and all office and management expenses, including directors' fees,

agency, legal and other like expenses; also all costs and expenses of and incidental to the compliance by the company with any order of the Board under this Act; and generally all such charges, if any, not above otherwise specified, as in all cases of English railway companies are usually carried to the debit of revenue as distinguished from capital account;

Formerly 51 Vict., cap. 29, sec. 2 (x). This term includes wages. *Allan v. Manitoba and North Western R.W. Co.*, 13 C.L.T. 349, necessary repairs. *Sage v. Shore Line R.W. Co.*, 2 Can. Ry. Cases 271, but does not necessarily include all expenses of operation and management incurred under an order of the court. *Charlesbois v. Great North-West Central R.W. Co.*, 11 Man. R. 42 and 135, nor, in England, the cost of defending an action to establish claims arising prior to the receivership. *Re Wrexham Mold, etc., R.W. Co.* (1900), 1 Ch. 261, 2 Ch. 436.

Apart from the statute it appears that the court has inherent jurisdiction to permit a receiver to make any necessary expenditures to save or properly maintain the property, but where all parties are not represented the necessity for such outlay must be very clear.

Greenwood v. Algesiras, etc., R.W. Co. (1894), 2 Ch. 205; *Securities, etc., Corporation Limited v. Brighton*, 68 L.T. 249; *Ritchie v. Central Ontario R.W. Co.*, 3 Can. Ry. Cas. 357.

(*dd.*) When any matter arises in respect of any lands which are not situated wholly in any one district, county, riding, division, city or place, and which are the property of one and the same person, the expressions "clerk of the peace," "justice," and "sheriff" respectively mean any clerk of the peace, justice or sheriff for any district, county, riding, division, city or place within which any portion of such lands is situated; and the expressions "clerk of the peace" and "sheriff" respectively include the like persons as in other cases. 51 V., c. 29, s. 2, Am.

When lands not situate wholly in one district.

2. The provisions of this section shall apply to the construction thereof, and to the words and expressions therein.

Formerly 51 Vict., cap. 29, sec. 2 (y).

Provisions to apply to this section.

PART III.

APPLICATION OF ACT.

General Remarks on Sections 3 to 7.

At first the General Railway Act was only made applicable to companies thereafter incorporated, 14 & 15 Viet., cap. 51, secs. 1 and 2, and when the Dominion of Canada was created and its Parliament legislated for railways within its jurisdiction, it was directed that the General Railway Act should apply only to the Intercolonial Railway and to all railways which might thereafter be constructed under the authority of any special Act passed by the Parliament of Canada, and to all companies thereafter to be incorporated for their construction and working, 31 Viet., cap. 68, secs. 2, 3 and 4. Accordingly the Great Western Railway Co., which had been incorporated long before Confederation, was able to plead successfully that the last named statute and the amending Act of 34 Viet. (D.), cap. 43, sec. 20 (4) did not apply to them. *Scott v. Great Western R.W. Co.*, 23 U.C.C.P. 182. *Allan v. Great Western R. W. Co.*, 33 U. C. R., 483. But this ruling was first broken into by 38 Viet. (D.), cap. 24, sec. 4, which enacted that sec. 20 of 34 Viet., cap. 43, should apply to every railway company theretofore incorporated. See *Scarlett v. Great Western R. W. Co.*, 41 U. C. R. 211, at p. 214. And gradually by subsequent legislation all the provisions of the General Act became binding upon companies previously incorporated, even though they had been incorporated by special acts of parliament, which at the time were self-contained.

By sec. 3, *infra*, the act is to apply to all persons, companies, and railways other than Government railways, within the legislative jurisdiction of the Parliament of Canada. By the British North America Act, 30 & 31 Viet., cap. 3 (Imp.), sec. 91, sub-sec. 29, all classes of subjects expressly excepted in the enumeration of the class of subjects assigned exclusively to the legislatures of the Provinces were to be within the jurisdiction of the Dominion of Canada; and by sec. 92, sub-sec. 10, the following classes are excepted from Provincial jurisdiction, and therefore are within exclusive jurisdiction of the Dominion of Canada;

- (a) Lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province.
- (b) Such works as, although wholly situated within the Province, are, before or after their execution, declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces.

Under the Dominion Railway Act of 1888, 51 Vict., cap. 29, sec. 306, certain railways, including the Intercolonial Railway, the Grand Trunk Railway, the Canada Southern Railway and the Canadian Pacific Railway, and some others which are now amalgamated with these companies were thereby declared to be works for the general advantage of Canada; and by sec. 307 it was enacted that they should be thereafter subject to the legislative authority of the Parliament of Canada, but that the provisions of any act of the legislature of any Province of Canada, passed prior to May 25th, 1883, relating to such railway or branch line, and in force at that date, should remain in force so far as they were consistent with any Act of the Parliament of Canada thereafter passed. These sections were originally enacted by 46 Vict., cap. 24, sec. 6 (D.).

Section 308 of the Dominion Railway Act, 1888, provided that the Governor-General, might, by proclamation or proclamations, confirm any one or more of the acts of the Legislature of any Province passed before the passing of the statute relating to any railway which by Act of the Parliament of Canada had been declared to be a work for the general advantage of Canada; and after the date of such proclamation the act or acts thereby declared to be confirmed were to be confirmed, ratified and made as valid as though duly enacted by the Parliament of Canada.

By 62 & 63 Vict., cap. 23, sec. 1 (D.), it was enacted that street railways and tramways, while declared to be subject to such provisions of the Railway Act as had reference to railway crossings, junctions, fences, penalties and statistics should not by reason of the fact of the crossing or connecting with the railways mentioned in sec. 306, of 51 Vict., cap. 29, be considered to be works for the general advantage of Canada, nor subject to any other provisions of that act; and special reference was made to

electric railways passing over the property of Queen Victoria Niagara Falls Park, which had been previously excepted by 56 Viet., cap. 27, sec. 3 (D.). These sections are not re-enacted by the present statute, and the question whether any company is within the jurisdiction of the Parliament of Canada must depend upon whether

- (a) They are lines between two or more Provinces or extending beyond the limits of a Province, or
- (b) Whether they are declared by any special Act to be a work for the general advantage of Canada or for the advantage of two or more Provinces.

Probably the railways mentioned in sec. 306 of the former consolidation all remain subject to the jurisdiction of the Parliament of Canada, because they are part of a system connecting two or more Provinces, or extending beyond the limits of a Province, or the company with which they have amalgamated has been declared by Special Act to be a work for the general advantage of Canada. If a railway lying wholly within the limits of one Province has maintained its separate organization or, though crossing a railway within the jurisdiction of the Dominion of Canada, lies wholly in one Province, an interesting question may arise whether it is now subject to the Dominion Railway Act or has become subject to the provisions of the Provincial Statutes only.

Difficult constitutional questions frequently arise out of these and similar enactments in considering their effects upon

- (a) The general law as administered in any of the Provinces.
- (b) Their effect upon Provincial legislation, and
- (c) Their effect upon other persons or corporations with whom the railway comes in contact.

A short summary of the effect of the cases upon these three points now follows:

(a) In *Canadian Pacific Railway Company v. Roy*, 1 Can. Ry. Cases 170, it was argued, and indeed decided by Bossé, J., delivering the judgment of the Court of Kings Bench in Quebec that a statute conferring upon a railway company the power to use fire, ought not to be so interpreted as to result in an infraction or invasion of the Quebec Civil Law under which a railway company has always been held liable for fire set out by its locomotives, even though no negligence were proved. In other

words that court declined to hold that Parliament legislating within its jurisdiction is supreme over the civil law, but this contention was disaffirmed by the Privy Council in the same case reported 1 Can Ry. Cases, 196, and it was there held that Parliament so legislating upon matters assigned to it was supreme over the civil law as well as over the common law as administered in the other Provinces and this notwithstanding the concluding words of sec. 288, of 51 Vict., cap. 29 (D.), now sec. 242, sub-sec. 3, *infra*.

It was explained by Mr. Fitzpatrick, the present Attorney-General for the Dominion, in 8 Rev. Leg. N.S. 306, that the decision of the Quebec judges appeared to have been based upon a misapprehension of the difference between the limited powers of the old French Parliament and the absolute authority of the Parliaments of Great Britain and similarly of Canada when the latter legislated upon subjects within the general scope of their jurisdiction: see also *Bell v. Westmount*, Q.R. 15 S.C. 580, 9 Q.B. 34.

(b) The effect of legislation declaring a railway to be a work for the general advantage of Canada upon prior or subsequent provincial legislation has been considered in a number of cases, of which the following is a summary:

In *Western Counties R. W. Co. v. Windsor & Annapolis R. W. Co.*, 7 A. C., 178, it was argued that the Dominion of Canada had no power under the sections of the B.N.A. Act already mentioned, to pass legislation which would have the effect of setting aside an agreement validated by Provincial Statute. The Judges of the Privy Council, while finding it unnecessary to decide this point, stated that whether the Parliament of Canada had or had not power to impair the obligations of legislative contracts of this character any act which purported to do so would be strictly construed and they would strive as far as possible to reconcile the two statutes rather than allow a subsequent Dominion statute to alter the terms of an agreement duly sanctioned by the Provincial Legislature. This case was recently followed in *Commissioner of Public Works (Cape Colony) v. Logan* (1903), A. C., 355. Where also a railway is incorporated under Provincial legislation designed to connect with a similar undertaking in another country or province the Dominion Parliament has no power on that account to legislate respecting the provincial undertaking unless it first declares that the same is a

work for the general advantage of Canada and the provincial legislation is valid even though the result of carrying it out will be to affect a connection with a similar work in another country or province. *European & North American R. W. Co. v. Thomas*, 14 N.B.R. 42, 2 Cartwright 439; and so also where a company has been incorporated by Dominion Statute for the purpose of establishing telephone lines in the several provinces, but not of connecting two or more provinces, and where the undertaking was not declared to be for the advantage of Canada or two or more provinces it was held that the Dominion Statute, so far as is professed to confer a right to erect poles in the streets of cities and towns, was invalid: *Regina v. Mohr*, 7 Q. L. R. 183, 2 Cartwright, 257. But where such a telephone company is expressly declared to be a work for the general advantage of Canada it may erect poles in the streets of cities and towns without obtaining the prior consent of the municipality as required by Provincial Municipal Legislation: *City of Toronto v. Bell Telephone Company*, 3 O.L.R. 465, 6 O.L.R. 335, (1905), A.C. 52; and the Privy Council in their judgment disapproved of *Regina v. Mohr, supra*. And even though the company should have previously confined the exercise of its powers to one province only, it is nevertheless a Dominion Company and may fully exercise the powers it derives from the Dominion in that one province: *Colonial Building, etc., Association v. Attorney-General, Quebec*, 9 A.C. 157, at p. 165.

A Dominion Railway is, however subject to any Provincial Statutes governing the general administration of justice in that province so long as those statutes do not affect its road-bed or the operation of the railway. For instance, most of the provisions of the Workman's Compensation Act of the various provinces apply to a Dominion Railway: *Canada Southern R. W. Co. v. Jackson*, 17 S. C. R. 316, and such a company is liable for taxation under various provincial laws: *Canadian Pacific R. W. Co. v. Notre Dame de Bousécours, Q. R.*, 7 Q. B. 121 (1899), A. C. 367. This case well illustrates the difference between provincial legislation affecting the construction or operation of a railroad and provincial legislation affecting merely the administration of the law and the civil rights and liabilities of railroad companies. See particularly the remarks of Lord Watson (1899), A. C., at p. 372, which are quoted 2 Can. Ry. Cases, pp. 266 and 267.

It was also held in the Province of Quebec that where a Provincial Statute (56 Viet., cap. 36, Q.) provided for the sequestration of a railway that statute dealt with procedure merely and was applicable to a Dominion line. As sequestration would have the effect of interfering with the actual roadbed and railway appliances it may be doubted whether this case would be applicable in other provinces. Two Judges, Hall and Wurtele, J.J., dissented: *Baie de Chaleur R.W. Co. v. Nantel*, R. J. Q., 9 S.C. 47, Q.R., 5 Q.B. 64. But it has also been held in Quebec that the land of a railway cannot be sold for taxes: *Montreal, etc., R.W. Co. v. Longueil*, Q.R. 9 S.C. 3, reversed Q. R. 10, S. C. 182, on the ground that a wharf on which no rails are laid is not an integral part of the railway. The Dominion of Canada also has power to legislate affecting property and civil rights as applied to a Dominion Railway and therefore it has been held in *Vogel v. Grand Trunk R. W. Co.* and *Morton v. Grand Trunk R. W. Co.*, 2 O. R. 197, 10 A. R. 162, and 11 S. C. R. 612, that the Federal Parliament has power to declare that contracts made by railway companies against the result of their own negligence shall be invalid: so also a Dominion Parliament may legislate upon questions of procedure where they affect Dominion railways: *Lamont v. Canadian Pacific R. W. Co.*, 5 Terr. L. R. 90; *Findlay v. Canadian Pacific R. W. Co.*, 2 Can. Ry. Cases, 380 and see notes at page 383; and *Zimmer v. Grand Trunk R. W. Co.*, 19 A. R. 693. Where, however, a Provincial Statute will interfere with the physical condition of a Dominion Railway Company that statute will be unconstitutional: *The Canadian Pacific R.W. Co. v. Notre Dame de Bonsécours*, *supra*. And so a Provincial Statute enacting that every railway company operating under the authority of the Dominion Act which fails to erect fences alongside of its track shall be liable in damages for cattle killed or injured by its trains or engines was declared to be *ultra vires*: *Madden v. Nelson & Fort Sheppard R.W. Co.*, 5 B.C.R. 541, (1899), A.C. 626, and in *Grand Trunk R.W. Co. v. Therrien*, 30 S.C.R. 485, it was held that provincial legislation in respect of farm crossings or the structural conditions of a Dominion railway was *ultra vires*. So also the Ontario Ditches and Water Courses Act, R.S.O. 1887, cap. 199, was held to be inapplicable to a Dominion Railway Company: *Miller v. Grand Trunk R.W. Co.*, 45 U.C.R. 222; and this principle was adopted in *McCrimmon v. Township of Yarmouth*, 27 A. R. 636,

and the provisions of the Ontario Railway Accidents Act, 44 Viet., cap. 22, now R. S. O., 1897, cap. 266, do not affect a Dominion railway, *Monkhouse v. Grand Trunk R.W. Co.*, 8 A.R. 637; *Clegg v. Grand Trunk R. W. Co.* 10 O. R., 708, nor do the provisions of the Workman's Compensation Act, now R. S. O. (1897), cap. 160, sec. 5, requiring that railway frogs should be packed during certain months of the year do not apply to a Dominion railway and this notwithstanding the fact that the general provisions of that statute creating a liability for injuries received by a workman in the employ of the master are made applicable as above mentioned: *Washington v. Grand Trunk R. W. Co.*, 24 A. R. 183. This decision was reversed upon the construction of the Dominion Railway Act, 51 Viet., cap. 29, sec. 262, but the view of the Court of Appeal in their report of the case was not attacked: see 28 S.C.R. 184, (1899) A.C. 275. So also the Provincial Legislature can not confer upon a provincial railway power to cross a Dominion line except subject to the provisions contained in the Dominion Railway Act: *Canadian Pacific R. W. Co. v. Northern Pacific R. W. Co.*, 5 Man. L. R. 301, nor does a provincial statute for the regulation of public franchises apply to a railway declared to be a work for the general advantage of Canada: *Attorney-General, ex rel. v. Vancouver, Victoria and Eastern R.W. Co.*, 9 B.C.R. 338: see also *Yale Hotel Co. v. same defendants*, 9 B. C. R., 66. In *Breeze v. Midland R.W. Co.*, 26 Gr. 225, it was held that a mechanic's lien could not be enforced against a railway and in *King v. Alford*, 9 O. R., 643 and *Larsen v. Nelson and Fort Sheppard R. W. Co.*, 4 B.C.R. 151, it was suggested, though perhaps not definitely decided, that such a lien created by virtue of a provincial statute would not attach against a Dominion Railway. Certainly on principle such a lien should not be enforced, for it would necessarily result in a sale of the undertaking, something that no provincial statute could authorize. The Dominion Government cannot incorporate a work without declaring it to be for general advantage, etc.: *Re Grand Junction Ry. v. Peterborough*, 6 A.R. 339, and see 8 S.C.R. 76. The Court of Appeal for Ontario in *Re Grand Junction R.W. Co. and Peterborough*, 6 A.R. 339, stated that the Dominion Parliament has no power to incorporate or legislate in respect of a railway company unless it also declared that the same was a work for the general advantage of Canada or two or more provinces. This point is not dealt with by the Su-

preme Court on Appeal from the decision of that Court, 8 S.C.R. 76, 13 A.C. 136.

(c.) The effect on persons or corporations other than the railway or their undertaking declared to be for the advantage of Canada. In *Bell Telephone Co. v. Toronto*, 3 O.L.R. 465, 6 O.L.R. 335, and (1905) A.C. 52, referred to, *supra*, it was decided that though there were provisions in the Municipal Act of Ontario vesting in cities control over their own streets, these provisions did not prevent a telephone company declared to be a work for the general advantage of Canada from proceeding to place their poles and wires in streets of the city, notwithstanding the latter's opposition, provided of course that they executed their works in the manner prescribed by the Dominion Statutes which affect them.

So also it has been held that a railway may under authority obtained from the Dominion of Canada construct a railway through lands owned by the Crown in the right of a Province: *Booth v. MacIntyre*, 31 U. C. C. P. 183. In *Canadian Pacific Railway Company v. Township and County of York* the question was discussed as to how far other corporations or persons were bound by the orders of the Railway Committee of the Privy Council for which the Board of Railway Commissioners have now been substituted. *Re Canadian Pacific R. W. Co. and Township and County of York*, 27 O. R. 559, 25 A. R. 65, 1 Can. Ry. Cases 36, 47. Though there was a division of the Judges it may be stated that the effect of this case is to hold that not only could the Dominion Parliament empower a railway company to cross highways within the province but it could compel municipalities interested in these highways to contribute towards the cost of the works necessary for the protection of the public in using them. This was based, perhaps, to some extent upon the fact that the municipalities had attended before the Railway Committee and therefore had attorned to their jurisdiction, but the effect of the decision is that not only railways but other persons or corporations are bound by the orders of the Railway Committee, and therefore by those of the present Board of Railway Commissioners while acting within the scope of the powers conferred upon them by the statute.

In *Grand Trunk R.W.Co. v. City of Toronto*, 32 O. R. 120, Meredith, J., decided in effect, that though the Provincial Legislature has power to authorize a municipality to acquire and

make any street and to provide how and upon what terms it may be acquired and made that power is subject to the supervision of Federal Legislation respecting works and undertakings such as the railway in question and such legislation might confer upon any person or public body the power to determine in what circumstances and how and upon what terms such a street might be acquired for railway purposes; and that legislation affecting railways within the jurisdiction of the Parliament of Canada may confer power upon another body to impose terms upon municipalities or other persons other than railway companies, upon which they must part with their control of streets or other property.

But it was further held in that case that the Dominion Parliament had not conferred upon the Railway Committee of the Privy Council power to make the terms which they had then made subject to which a street was to be altered and the expenses of alteration paid partially by the railway company and partially by the municipality.

So also the Dominion Parliament had power to pass the Statute 56 Viet., cap. 27 (D.), sec. 1, enacting that no railway should be crossed by an electric railway except with the approval of the Railway Committee, and as a result of that power an electric railway though created by Provincial Act, which expressly prohibited crossing a Dominion railway at grade might, with the approval of the Railway Committee, acting under the Dominion Statute, cross the railway at grade notwithstanding the prohibition contained in its provincial charter: *Grand Trunk R. W. Co. v. Hamilton, etc., R. W. Co.*, 29 O. R. 143.

Where a railway created by an Ontario Charter or by subsequent Federal Legislation was declared to be a work for the general advantage of Canada, it was decided that thereafter the provisions of the Dominion Railway Act apply to expropriation proceedings taken by the railway: *Darling v. Midland R.W. Co.*, 11 P. R. 32; *Barbeau v. St. Catharines & Niagara Central R. W. Co.*, 15 O. R. 586; *Bowen v. Canada Southern R.W. Co.*, 14 A. R. 1; see also on this subject the notes upon the case of *Re Columbia & Western R. W. Co.*, 2 Can. Ry. Cases 264, at pp. 265 to 270.

Applica-
tion of
Act.

3. This Act shall apply to all persons, companies and railways (other than Government railways) within the legislative

authority of the Parliament of Canada, and shall be incorporated and construed, as one Act, with the Special Act, subject as herein provided. 51 V., c. 29, s. 3, Am.

The changes between this and the section in the previous act are alterations in the arrangement of words only.

Government Railways are those which are vested in the Crown as represented by the Dominion Government and which are under the control and management of the Minister of Railways and Canals, R.S.C., cap. 38, sec. 4.

Special Act. These words are defined *ante*, sec. 2 (*w*). By 2 Edw. VII, cap. 15, sec. 5 (D.), a railway company may only be incorporated by Act of Parliament and not by letters patent.

4. Any section of this Act may, by any Special Act passed by the Parliament of Canada, be excepted from incorporation therewith or may thereby be extended, limited or qualified. It shall be sufficient, for the purposes of this section, to refer to any section of this Act by its numbers merely. (New.)

Any section may be excepted by Special Act.

This provision is probably inserted *ex abundanti cautela* for the Parliaments of Canada and of the Provincial Legislatures are supreme and may enact anything they wish provided they are legislating upon matters within the scope of their jurisdiction.

The principle of the *Darmouth College Case*, 4 Wheaton 518, to the effect that a state legislature has no power expressly or by implication to repeal or abridge charter rights once conferred cannot be said to be applicable to the Canadian and English theories of the unrestricted powers of Parliament: *Re McDowell and Town of Palmerston*, 22 O. R. 563. See this subject discussed, 21 Can. L. T., at p. 456 *et seq.*, *Re Goodhue*, 19 Gr. 366 and *Toronto and Lake Huron R.W. Co. v. Crookshank*, 4 U.C. R. at p. 318. Sub-sec. 47 of sec. 7 of R. S. C., cap. 1, also reserves to Parliament the power of repealing or amending any privilege or advantage granted to any one by Act of Parliament.

5. If in any Special Act heretofore passed by the Parliament of Canada it is enacted that any provision of the General Railway Act in force at the time of the passing of such Special Act,

Or may be extended, limited or qualified.

As to exceptions, etc., previous to this Act.

Conflict between this Act and Special Act.

is excepted from incorporation therewith, or if the application of any such provision is, by such Special Act, extended, limited or qualified, the corresponding provision of this Act shall be taken to be excepted, extended, limited or qualified, in like manner; and, unless otherwise expressly provided in this Act, where the provisions of this Act and of any Special Act passed by the Parliament of Canada relate to the same subject-matter, the provisions of the Special Act shall be taken to over-ride the provisions of this Act in so far as is necessary to give effect to such Special Act. 51 V., c. 29, ss. 5 and 6, Am.

Under the Railway Act of 1888 the provisions relating to the incorporation, organization and internal management of railways and the rights and duties of directors, officers and shareholders *inter se* comprised in sees. 32 to 89, inclusive, did not apply to every railway but only to those whose authority to construct and operate were derived from the Dominion Parliament and accordingly these sections would not apply to railway companies whose authority on these points was derived from legislation earlier than confederation. But under the present section all these last named railways would be governed by the corresponding provisions of the present act and the effect of sees. 5 and 6 would appear to be to abrogate any provisions of pre-confederation special acts or acts of provincial legislatures so far as they may be inconsistent with Dominion legislation upon a cognate subject. On the other hand, post-confederation special acts of the Parliament of Canada would still over-ride the general provisions of this Statute.

"Corresponding provision." This term appeared in the Consolidated Railway Act of 1888. It was never decided under that or previous Statutes containing the same expression whether a section dealing with the same subject matter in an amended form was a "corresponding provision" or not. It is conceivable that such amended clause might be a similar without being a corresponding provision. In the above section, however, the term would probably be explained by the succeeding portions of the same clause providing that where the provisions of the special act "relate to the same subject matter" the latter shall over-ride the provisions of this Act.

Where in a special act there were provisions inconsistent with the General Railway Act then in force it has been held even without an express statutory declaration that the provisions of the Special Act must prevail: *Canadian Pacific R. W. Co. v. Major*, 1 B.C.R. 287, 13 S.C.R. 233; *Ontario, etc., R.W. Co. v. Canadian Pacific R.W. Co.*, 14 O.R. 432. In the latter case the following useful general principles of construction are laid down:

- (a) When a company is incorporated by a Special Act and there are provisions in the Special Act as well as in the general act on the same subject, which are inconsistent if the Special Act gives in itself a complete rule on the subject the expression of that rule amounts to an exception of the subject matter of the rule out of the general act; but
- (b) When the rule given by the Special Act applies only to a portion of the subject, the Special Act may apply to one portion and the general act to the other.

6. Where any railway, the construction or operation of which is authorized by a Special Act passed by the Legislature of any province, is declared, by any Special Act of the Parliament of Canada, to be a work for the general advantage of Canada, this Act shall apply to such railway, and to the company constructing or operating the same, to the exclusion of such of the provisions of the Special Act of the Provincial Legislature as are consistent with this Act, and in lieu of any General Railway Act of the province. (*New.*)

The enactment of this section makes it clear that after a declaration that a railway is for the general advantage of Canada it must refer exclusively to the Dominion Act for a definition of its powers, duties and obligations in any case in which the Provincial and Dominion legislation clash even though it had been incorporated by and had been previously proceeding under powers conferred upon it by a Provincial Legislature. Previously this was not the case, see *Darling v. Midland R. W. Co.*, 11 P.R. 32; *Re Barbeau and St. Catharines and Niagara Central R.W. Co.*, 15 O.R. 583; *Barbeau v. St. Catharines and Niagara Central R.W. Co.*, 15 O.R. 586; *Bowen v. Canada Southern*

R. W. Co., 14 A. R. 1, per Osler, J. A., at p. 10; *Toronto Belt Line R. W. Co. v. Lauder*, 19 O. R. 607, where under earlier Consolidations a contrary view had been taken. The principle of the present enactment had already been adopted in British Columbia in *Re Columbia and Western R. W. Co.*, 2 Can. Ry. Cases 264.

The mere fact that a company is incorporated by Act of Parliament of the Dominion does not make it a work for the general advantage of Canada, if it is intended to confine the undertaking to one province, unless there is some declaration that it is a work for the general advantage of Canada: *Regina v. Mohr*, 7 Q.L.R. 183; 2 Cart. 257, disapproved, however, in *Toronto v. Bell Telephone Co.* (1903), A.C. 52, at p. 57; but this declaration need not be express and may arise from necessary implication merely and therefore a recital in a Dominion Act of Incorporation that it is for the general advantage of Canada that the Act be passed is a sufficient declaration to bring the undertaking within the exclusive jurisdiction of the Dominion Parliament: *Re Ontario Power Co. and Hewson*, 6 O.L.R. 11.

Provin-
cial
Sunday
observ-
ance laws
to apply
to local
railways.

“6A. Notwithstanding anything in this Act or in any other Act, every railway, steam or electric street railway and tramway, wholly situate within one province of Canada, but, in its entirety or in part, declared by the Parliament of Canada to be a work for the general advantage of Canada, and every person employed thereon, in respect of such employment, and every person, company, corporation or municipality owning controlling or operating it wholly or partly, in respect of such ownership, control or operation, shall, notwithstanding such declaration, be subject to any Act of the legislature of the province in which it is situate, prohibiting or regulating work, business or labour upon the first day of the week, commonly called Sunday, which is in force at the time of the passing of this Act; and every such Act is hereby, in so far as it is in other respects within the powers of the legislature, confirmed and ratified, and made as valid and effectual for the purposes of this section as if it had been duly enacted by the Parliament of Canada.

“2. The Governor in Council may at any time and from time to time by proclamation confirm, for the purposes of this section, any Act of the legislature of any province passed after the passing of this Act for the prohibition or regulation of work, business or labour upon the first day of the week, commonly called Sunday; and from and after the date of any such proclamation the Act thereby confirmed, in so far as it is in other respects within the powers of the legislature, shall for the purposes of this section be confirmed and ratified and made as valid and effectual as if it had been enacted by the Parliament of Canada; and, notwithstanding anything in this Act or in any other Act, every railway, steam or electric street railway, and tramway, wholly situate within such province, but declared by the Parliament of Canada to be, in its entirety or in part, a work for the general advantage of Canada, and every person employed thereon, in respect of such employment, and every person, company, corporation or municipality owning, controlling or operating it wholly or partly, in respect of such ownership, control or operation, shall thereafter, notwithstanding such declaration, be subject to the Act so confirmed in so far as that Act is otherwise *intra vires* of the legislature.

“3. This section shall not apply, so as to interfere with or affect through traffic thereon, to any railway or part of a railway which forms part of a continuous route or system operated between two or more provinces, or between any province and a foreign country, or to any railway or part of a railway between any of the ports on the great lakes and such continuous route or system; nor shall it apply to any railway or part of a railway which the Governor in Council, by proclamation, declares to be exempt from the provisions of this section.”

This was added by 4 Edw. VII., cap. 32, sec. 2, assented to August 10th, 1904.

By sec. 91, sub-sec. 27, of the B.N.A. Act, 1867, criminal law is reserved for the exclusive legislative authority of the Parliament of Canada. Therefore Provincial Statutes rendering illegal

Confirmation of provincial law by Governor in Council.

Certain railways excepted.

the performance of certain act on Sunday are *ultra vires*: *Attorney-General for Ontario v. Hamilton Street R.W. Co.* (1903), A. C. 524. In that case it was held that R.S.O., 1897, cap. 246, intitled "An Act to prevent the profanation of the Lord's Day," was illegal. The effect of this is that all changes made in the Lord's Day Act since Confederation by the Province of Ontario are unconstitutional, and the only Act in force now is C.S.U.C., cap. 104, re-enacting 8 Viet., cap. 45. The English proto-type for this legislation is 29 Car. II., cap. 7. In Nova Scotia in *The Queen v. Halifax Electric R.W. Co.*, 30 N.S.R. 469, the principles discussed in the above cases are also considered with reference to Nova Scotian legislation, and a similar result is arrived at.

Under the legislation mentioned, it has been held that the exception in sec. 1 of the Act rendering lawful the conveying of "travellers" will apply to all persons carried, whether for business or pleasure, with luggage or without, and on a through journey or for a short distance: *Reg. v. Daggett*, 1 O.R. 537; *Attorney-General v. Hamilton Street R.W. Co.*, 27 O.R. 49; 24 A.R. 170; and also that corporations are not within the scope or intention of the Act: *Attorney-General v. Hamilton Street R.W. Co.*, *supra*. Railways which are declared to be for the general advantage of Canada cannot of course be affected in their operation by provincial legislation (except so far as sec. 6 (a), *supra*, makes such legislation applicable) and therefore their employees who work for them on that day cannot be prosecuted for a breach of the Statute: *Reg. v. Todd*, 30 O.R. 732.

Besides the attempt to ensure abstinence from ordinary travelling on Sunday by making it an offence, which, as will be seen, has failed, it has been usual in Ontario in granting charters for local electric and street railway companies to provide that their powers of operation shall be conferred upon them for every day except Sunday. The effect of this was considered in *Attorney-General v. Niagara Falls Park, etc., R.W. Co.*, 19 O.R. 624; 18 A.R. 453, and it was held that though the company might be guilty of a nuisance if it used the streets on Sunday, and might be unable to plead legislative authority for doing any damage ordinarily incident to running its cars; yet there was no express prohibition against running on Sunday, and it ought not to be restrained upon information filed by the Attorney-General from operating its cars on that day, as no substantial injury to the public or to proprietary rights was shewn. Similar, but more

specific qualifications appear in various private Acts incorporating these companies, and also in general Acts providing for their incorporation, such as R.S.M. (1902), cap. 102, sec. 6, and R.S.O. (1897), cap. 209, sec. 136. Where such railway companies became by enactment or otherwise works for the general advantage of Canada it became a question whether such restrictions upon their powers of operation when removed to federal jurisdiction could any longer exist, and it is no doubt with a view to dealing with this subject and under certain circumstances as set out in the amendment, preserving to provincial legislatures their power to bind local works subject to federal jurisdiction by enactments respecting Sunday, that the above section has been passed.

7. Every railway, steam or electric street railway or tramway, the construction or operation of which is authorized by a Special Act passed by the Legislature of any province, now or hereafter connecting with or crossing a railway which, at the time of such connection or crossing, is subject to the legislative authority of the Parliament of Canada, is hereby declared to be a work for the general advantage of Canada in respect only to such connection or crossing or to through traffic thereon or anything appertaining thereto, and also to the provisions set forth in this Act relating to offences and penalties, navigable waters and criminal matters, and this Act shall apply to that extent only.

2. This section shall not, however, operate as regards through traffic on railways owned by any Provincial Government, without the consent of such government. (*New.*)

By sec. 306 of the Consolidated Railway Act of 1888, which was itself a re-enactment of 46 Vict., cap. 24, sec. 6 (D.), it was declared that any branch line or railway which connected with or crossed a railway declared to be a work for the general advantage of Canada should itself be deemed to be a work for the general advantage of Canada. The effect of this was that the street railways or other railways or works using the highways passed from municipal and provincial control under the control of the

Railway Committee of the Privy Council and such loss of municipal control impaired or was thought to impair the value of those municipal franchises which are dependent upon the right of municipalities to grant a right of way over the highways under its control upon such terms as it saw proper and as might be authorized by provincial legislation. This effect would appear to follow from the recent case of *City of Toronto v. Bell Telephone Co.*, 3 O.L.R. 465, 6 O.L.R. 335, (1905), A.C. 52. To obviate the danger of such loss of control and of impairment of such advantageous agreements as a municipality might have entered into with a street railway company it was enacted by 63 & 64 Viet., cap. 23, sec. 1 (D.), that street railways and tramways while declared to be subject to the provisions of the Railway Act (1888) relating to crossing or connecting with a railway under Dominion jurisdiction should not be considered to be works for the general advantage of Canada, nor be subject to any other provisions of the Railway Act. These sections are not re-produced in the present statute, but sec. 7 is no doubt intended to take their place.

The new section is very broad and its effect may be that every railway incorporated by Provincial Legislation, which does not extend beyond the limits of a province and which has not by enactment been declared to be a work for the general advantage of Canada is now remitted to the provincial jurisdiction, except upon the subjects of crossing or connecting with another rail- or the "through traffic" passing over its lines, or other matters expressly mentioned in the section. That is, its effect may not be and apparently is not limited to street railways or railways upon streets, but also to all railways not extending beyond the limits of a province and not expressly declared to be a work for the general advantage of Canada.

It may easily be that under the present enactments certain railways within the limits of the province which were formerly subject to the provisions of the General Railway Act by virtue of the fact that they crossed other railways which were declared to be for the general advantage of Canada are no longer subject to the provisions of the new Dominion Act except as to crossings, connections and through traffic and that in other respects they are now subject only to the provisions of the Provincial Railway Acts and their own charters of incorporation. Although in previous consolidations of the Dominion Railway Act it has been

customary to declare that certain sections only shall apply to some railways which had been incorporated by the Provincial Legislatures either before or after Confederation this is the first time that it has been enacted that a railway company shall be considered to be a work for the general advantage of Canada for certain purposes only, and it remains to be decided whether it is competent for the Parliament of Canada to declare that a railway shall be deemed to be a work for the general advantage of Canada for certain purposes only and shall be subject to the jurisdiction of Canada only in regard to a few out of many of the matters which necessarily arise during the construction or operation of such a railway. From a comparison of secs. 91 and 92 of the British North America Act it would appear to have been within the contemplation of the Imperial Parliament to place these undertakings either within the exclusive jurisdiction of the Provincial authorities or else within the exclusive jurisdiction of the Dominion Government, and there is no express provision that the Dominion Government may assume to itself certain limited powers only in regard to the railways or other works mentioned in the sections already referred to and may leave to the provinces the power to deal with the other matters not thereby undertaken by the Dominion.

It is true that in *Hodge v. The Queen*, 9 A.C. 117, 3 Cart. 144, it was stated that subjects which in one aspect and for one purpose, fall within sec. 92 of the British North America Act may, in another aspect and for another purpose, fall within sec. 91; but this had reference to the principles governing certain general classes of matters with which either the Province or the Dominion might conceivably have power to deal and can hardly be considered applicable to such concrete objects as a railway, a steamship line or the other works referred to in sec. 92, sub-secs. 10(a), (b), and (c). It may yet become a question of some difficulty and nicety whether these railways can thus be made the subjects of a divided as distinguished from an exclusive jurisdiction.

PART IV.

COMMISSION.

Name, Constitution Duties, etc., secs. 8-22.

Jurisdiction and General Powers, secs. 23-25.

Name and constitution.	8. The Railway Committee of the Privy Council is hereby abolished and, in lieu thereof, there shall be a Commission, to be known as the "Board of Railway Commissioners for Canada," consisting of three members who shall be appointed by the Governor-in-Council, at any time after the passing of this Act, and
Court of Record.	from time to time as vacancies occur. Such Commission shall be a Court of Record, and have an official seal which shall be judicially noticed. Each Commissioner shall hold office during good
Term of office.	behaviour for a period of ten years from the date of his appointment, but may be removed at any time by the Governor-in-Council
Removal.	for cause; and shall cease to hold office upon reaching the age of
Age limit.	seventy-five years. Each Commissioner on the expiration of his term of office shall be eligible for reappointment. One of such
Chief Commissioner and Deputy.	Commissioners shall be appointed, by the Governor-in Council, Chief Commissioner of the Board, and shall be entitled to hold the office of Chief Commissioner so long as he continues a member of the Board; and another of the Commissioners shall be appointed by the Governor-in-Council, Deputy Chief Commissioner of the Board. Sub. for 51 V., c. 29, s. 8.

This and other similar sections are largely copied from the English Railway and Canal Traffic Act, 1888, 51 & 52 Viet., cap. 25. By sections 2 and 3 of the English Act provision is made that the Railway and Canal Commission shall be a Court of Record with an official seal to be judicially noticed.

A Court of Record is one whose records are absolutely authoritative, as distinguished from Courts not of Record, or inferior courts, whose proceedings must in every case be proved

like other facts. The High Court of Justice and the Court of Appeal are Superior Courts of Record both in Ontario and England. (See English Judicature Act, 1873, 36 & 37 Vict., cap. 66, secs. 16 and 18; Ontario Judicature Act, R.S.O. 1897, cap. 51, secs. 25 and 49.)

2. Whenever by an Act or document the Railway Committee Board invested with powers and duties of Railway Committee of P. C. of the Privy Council is given any power or authority, or any duty is cast upon it, in regard to any company, railway, matter or thing, the power or authority so given, or the duty so cast upon the said Committee, may or shall, as the case may be, be exercised by the Board.

See also section 33, giving the Board power to repeal, rescind, etc., any order or regulation made by the Railway Committee.

9. In case of the absence of the Chief Commissioner, or of his inability to act, the Deputy Chief Commissioner shall exercise the powers of the Chief Commissioner in his stead; and in such case all regulations, orders and other documents signed by the Deputy Chief Commissioner shall have the like force and effect as if signed by the Chief Commissioner. Whenever the Deputy Chief Commissioner appears to have acted for and instead of the Chief Commissioner, it shall be conclusively presumed that he so acted in the absence or disability of the Chief Commissioner within the meaning of this section. Power of Deputy Commissioner.

10. Not less than two Commissioners shall attend at the hearing of every case, and the Chief Commissioner, when present, shall preside, and his opinion upon any question which in the opinion of the Commissioners is a question of law, shall prevail. Not less than two to act. Exception In any case where there is no opposing party, and no notice to be given to any interested party, any one Commissioner may act alone for the Board.

In the English Railway and Canal Traffic Act, 1888, sec. 4, provision is made for *ex officio* Commissioner, who must be a Judge of a Superior Court and is appointed by the Lord Chancellor of England or Ireland and the Lord President of the Court of Session in Scotland.

The provision for deciding a question of law is the same as section 5 (3) of the English Act.

In an application under section 193 the opinion of the Chief Commissioner prevailed on the questions of law involved, where an exclusive contract was held valid and the parties whose interests were affected held entitled to compensation.

The Telephone Case, 3 Can. Ry. Cas. 205.

Interest,
kindred
or affinity
not a dis-
qualifica-
tion.

Appoint-
ments
pro hac
vice.

11. No Commissioner shall be disqualified to act, by reason of interest, or of kindred or affinity to any person interested in any matter before the Board; but whenever any Commissioner is interested or of kin or affinity to any such person, the Governor-in-Council may either upon the application of such Commissioner or otherwise, appoint some disinterested person to act as Commissioner *pro hac vice*. The Governor-in-Council may also appoint a Commissioner *pro hac vice* in the case of sickness, absence or inability to act, of any Commissioner.

Commis-
sioners
not to
hold
railway
stock,
etc.

2. No Commissioner shall, directly or indirectly, hold, purchase, take or become interested in, for his own behalf, any stock, share, bond, debenture or other security, of any railway company subject to this Act, nor shall, directly or indirectly, have any interest in any device, appliance, machine, patented process or article, or any part thereof, which may be required or used as a part of the equipment of railways, or of any rolling stock to be used thereon; and, if any such stock, share, bond or other security, device, appliance, machine, patented process or article, or any part thereof, or any interest therein, shall come to or vest in any such Commissioner by will or succession, for his own benefit, he shall, within three calendar months after the same shall so come to or vest in him, absolutely sell and dispose of the same, or his interest therein.

Residence

12. Each Commissioner shall during his term of office reside at Ottawa, in Canada, or within five miles thereof, or within such distance thereof as the Governor-in-Council at any time determines.

13. The Commissioners shall devote the whole of their time to the performance of their duties under this Act, and shall not accept or hold any office or employment inconsistent with this section.

Duty of Board.

14. The Governor-in-Council, upon the recommendation of the Minister, shall provide, within the city of Ottawa, a suitable place in which the sessions of the Board may be held, and also suitable offices for the Commissioners, Secretary, staff, and other employees, and all necessary furnishings, stationery and equipment for the establishment, conduct and maintenance of the same, and for the performance of the duties of the Board.

Offices at Ottawa.

15. Whenever circumstances render it expedient to hold sessions without the city of Ottawa, the Board may hold the same in any part of Canada.

Sessions of Board outside of Ottawa

16. The Commissioners shall sit at such times and conduct their proceedings in such manner as may seem to them most convenient for the speedy despatch of business; they may, subject as in this Act mentioned, sit either together or separately, and either in private or in open court, but any complaint made to them shall, on the application of any party to the complaint, be heard and determined in open court. Any two members of the Board shall constitute a quorum. No vacancy in their body shall impair the right of the remaining Commissioners to act.

Sittings, how conducted.

17. There shall be a Secretary of the Board, who shall be appointed by the Governor-in-Council, shall hold office during pleasure, and shall reside in the city of Ottawa. It shall be the duty of the Secretary to attend all sessions of the Board, to keep a record of all proceedings conducted before the Board or any Commissioner under this Act, to have the custody and care of all records and documents belonging or appertaining thereto, or filed in his office, and to obey all rules and directions which

Secretary

Duties of Secretary

may be made or given by the Board touching his duties or the governance of his office. Sub. for 51 V., c. 29, s. 9.

Regulations and orders of the Board. 18. It shall be the duty of the Secretary to have every regulation and order made by the Board, drawn pursuant to the direction of the Board, signed by the Chief Commissioner, sealed with the official seal of the Board, and filed in the office of the Secretary.

Record books. 2. The Secretary shall keep in his office suitable books of record, in which he shall enter a true copy of every such regulation and order and every other document which the Board may require to be entered therein, and such entry shall constitute Evidence. and be, and in all courts be deemed and taken to be, the original record of any such regulation or order.

Certified copies of regulations or orders. 3. Upon application of any person, and on payment of such fees as the Board may prescribe, the Secretary shall deliver to such applicant a certified copy of any such regulation or order.

Acting Secretary. 19. In the absence of the Secretary from sickness or any other cause, the Board may appoint from its staff an Acting Secretary, who shall thereupon act in the place of the Secretary, and exercise his powers.

Salaries. 20. The Chief Commissioner shall be paid an annual salary of ten thousand dollars, and the other two Commissioners shall be paid each the annual salary of eight thousand dollars. The Secretary shall receive a salary fixed by the Governor-in-Council, not more than four thousand dollars, annually. Such salaries shall be paid monthly out of the unappropriated funds in the hands of the Receiver-General for Canada.

Experts. 21. The Governor-in-Council may from time to time, or as the occasion requires, appoint one or more experts, or persons having technical or special knowledge of the matters in question, to assist in an advisory capacity in respect of any matter before the Board.

2. There shall be attached to the Board such officers, clerks, stenographers and messengers, as the Board, with the approval of the Governor-in-Council, from time to time appoints, at such salaries or remunerations as are recommended by the Board and approved by Governor-in-Council. The Board may, at will, dismiss any such employee.

Staff of Board.

Salaries.

3. Whenever the Board, by virtue of any power vested in it by this Act, appoints or directs any person, other than a member of the staff of the Board, to perform any service required by this Act, such person shall be paid therefor such sum for services and expenses as the Governor-in-Council upon the recommendation of the Board, may, in such cases, determine.

Payment of appointee to make inquiry.

4. The salaries or remunerations of all such officers, clerks, stenographers, messengers, and appointees, and all the expenses of the Board of, and incidental to, the carrying out of this Act, including all actual and reasonable travelling expenses of the Commissioners, Secretary, and of such appointees or members of the staff of the Board as may be required by the Board, to travel, necessarily incurred in attending to the duties of their office, shall be paid monthly out of moneys to be provided by Parliament.

Salaries and expenses of staff, etc., how to be paid.

22. All letters or mailable matter addressed to the Board of the Secretary at Ottawa, or sent by the Board or the Secretary from Ottawa, shall be free of Canada postage under such regulations as are from time to time made in that regard by the Governor-in-Council.

Correspondence free of postage.

Jurisdiction and General Powers.

23. The Board shall have full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested;

Jurisdiction of Board upon application.

Neglect of duties under any act, regulation or order. (a.) complaining that the company, or any person, has failed to do any act, matter or thing required to be done by this Act, or the Special Act, or by any regulation, order or direction made thereunder, by the Governor-in-Council, the Board, the Minister, or any inspecting engineer, or has done or is doing any act, matter or thing contrary to, or in violation of, this Act, or the Special Act, or any such regulation, order, or direction;

Violations.

Giving orders, directions or approval. (b.) requesting the Board to make any order, or give any direction, sanction or approval, which by law it is authorized to make or give:

Mandatory order. And the Board may order and require any company or person to do forthwith, or within or at any specified time, and in any manner prescribed by the Board, so far as is not inconsistent with this Act, any act, matter or thing which such company or person is or may be required to do under this Act, or the Special Act, and may forbid the doing or continuing of any act, matter or thing which is contrary to this Act, or the Special Act; and shall have full jurisdiction to hear and determine all matters whether of law or of fact, and shall, as respects the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry on and inspection of property, and other matters necessary or proper for the due exercise of its jurisdiction under this Act, or otherwise for carrying this Act into effect, have all such powers, rights and privileges as are vested in a Superior Court.

Injunction order.

Questions of law and fact.

All powers of a Superior Court.

The jurisdiction of the Board, as of the Railway Committee, is statutory and must be found in the Act constituting it. It can only exercise such powers as are by statute conferred upon it.

Grand Trunk R.W. Co. v. Toronto, 1 Can. Ry. Cas. 92.

The Merriton Crossing Case, 3 Can. Ry. Cas. 267.

An order of the Railway Committee of itself and apart from the provisions of law thereby made applicable confers no authority.

Corporation of Parkdale v. West, 12 App. Cas. 611.

Section 11 of the Act of 1888, for which this section is substituted, specified in detail the various matters mentioned in the Act over which the Railway Committee had jurisdiction; these are covered by the general provisions in (a), the first part of (b) and section 25(g). What follows in (b) is new, giving the Board the powers of a Superior Court as to evidence, procedure and the enforcement of its decisions by issuing orders in the nature of a mandamus or an injunction. This portion of the section is the same as section 18 of 51 & 52 Vict., cap. 25 (Imp.) (Railway and Canal Traffic Act), omitting the provision that "No person shall be punished for contempt of Court without the consent of the *ex officio* Commissioner."

2. The decision of the Board upon any question of fact, and as to whether any company, municipality or person is, or is not, a party interested within the meaning of this section, shall be binding and conclusive upon all companies and persons, and in all courts. Sub. for 51 V., c. 29, s. 11.

Decision upon questions of fact or whether party is interested conclusive.

This is new and was probably introduced to meet the point decided in *Re Canadian Pacific R.W. Co. and York*, 1 Can. Ry. Cas. 47, where the Ontario Court of Appeal decided that the county of York was not a "person interested" in the protection of a highway within the jurisdiction of the Township of York by gates and watchmen at a railway crossing within the meaning of sections 11, 187 and 188 of the Act of 1888. This decision was followed in *Frontenac v. Grand Trunk R.W. Co.*, 8 Ex. C.R. 349, and *Grand Trunk R.W. Co. v. Toronto*, 3 O.W.R. 602.

Other decisions upon the jurisdiction of the Railway Committee under the Act of 1888 are collected in 1 Can. Ry. Cas. as follows:

Toronto v. Metropolitan R.W. Co., p. 63. (Powers of Committee are confined to approving mode and place of crossing or junction of railways.)

Grand Trunk R.W. Co. v. Toronto, p. 82. (Committee cannot delegate its powers.)

Ottawa, Arnprior & Parry Sound R.W. Co. v. Atlantic & N. W. R.W. Co., p. 101. (Court will not interfere with a matter in which Committee has jurisdiction, *e.g.*, conflicting surveys and locations of railway lines.)

Also *Grand Trunk R.W. Co. v. Hamilton Radial Electric R.W. Co.*, 29 O.R. 143. (Committee under its exclusive jurisdiction could authorize crossing at grade against will of plaintiffs.)

Credit Valley R.W. Co. v. Great Western R.W. Co., 25 Gr. 507. (Statutory requirement of Committee's approval cannot be waived by consent.)

Canadian Pacific R.W. Co. v. Northern Pacific & Manitoba R.W. Co., 5 Man. L.R. 301. (Such approval must be obtained, not merely applied for.)

The Board has no power to make an *ex post facto* order.

The Merritton Crossing Case, 3 Can. Ry. Cas. 263.

The York Street Bridge Case, 4 Can. Ry. Cas. 62.

"Person" includes any body corporate or politic, and the heirs, etc., of such person. (Interpretation Act, R.S.C. 1886, cap. 1, sec. 7 (22)).

"Party interested." The word party means a person in particular, and is also used as a noun of multitude. (See Stroud's Judicial Dictionary, 2nd Edition, sub. nom. "party.")

For the application of this provision, see section 47.

23. The powers of the Board under this section are to a considerable extent similar to those of the Inter-State Commerce Commission of the United States under the Act to Regulate Commerce (1887), 24 U.S. Statutes at Large 379, and amending Acts. See "Tariffs and Tolls," sections 251 to 275. It has no power to construe, interpret, or apply the Act in advance of an actual act or omission by a railway company in contravention of the provisions of the Act: *Re Order of Railway Conductors*, 1 I.C. Rep. 18.

Board
may act
upon its
own
motion.

24. The Board may, of its own motion, or shall, upon the request of the Minister, inquire into, hear and determine any matter or thing, which, under this Act, it may inquire into, hear and determine upon application or complaint, and with respect thereto shall have and may exercise the same powers as, upon any application or complaint, are vested in it by this Act.

2. Any power, or authority vested in the Board under this Act, may though not so expressed in this Act, be exercised from time to time, or at any time, as the occasion may require.

Power
to act
from
time to
time.

25. The Board may make orders and regulations: —

(a.) limiting the rate of speed at which railway trains and locomotives may be run in any city, town or village, or in any class of cities, towns or villages described in any regulation; and, if the Board thinks fit, the rate of speed within certain described portions of any city, town or village, and allowing another rate of speed in other portions thereof;

Board
may
make
regula-
tions re-
specting—

Speed of
trains.

By section 227 the rate shall not exceed ten miles per hour unless the track is fenced or properly protected or permission is given by the Board.

(b.) with respect to the use of the steam whistle within any city, town or village, or any portion thereof;

Use of
steam
whistle.

By section 224 the engine whistle shall be sounded at least eighty rods before reaching a highway crossing at rail level except within the limits of cities or towns when the municipal authority may pass by-laws prohibiting the same.

(c.) with respect to the method and means of passing from one car to another, either inside or overhead, and for the safety of railway employees while passing from one car to another, and for the coupling of cars; 51 V., c. 29, s. 10, Am.

Passing
from
car to
car.
Coupling
of cars.

(d.) requiring proper shelter to be provided for all railway employees when on duty; 57-58 V., c. 53, s. 1, Am.

Shelter
for em-
ployees.

(e.) with respect to the use on any engine, of nettings, screens, grates and other devices, and the use on any engine or car of any appliances and precautions, and generally, in connection with the railway respecting the construction, use and maintenance of any fire-guard or works which may be deemed by the

Devices,
to avoid
fires.

Board necessary and most suitable to prevent, as far as possible, fires from being started, or occurring, upon, along, or near the right of way of the railway;

The observance of this provision does not appear to assist the company in disputing liability under section 239 (2) where the damages do not exceed \$5,000.

For protection generally. (f.) with respect to the rolling stock, apparatus, cattle-guards, appliances, signals, methods, devices, structures and works, to be used upon the railway so as to provide means for the due protection of property, the employees of the company, and the public;

Other matters. (g.) with respect to any matter, act or thing which by this or the Special Act is sanctioned, required to be done, or prohibited.

Reproduces 51 Viet., cap. 29, sec. 11(r). Sub-section 3, section 279, provides for penalties.

Application of orders. 2. Any such orders or regulations may be made to apply to any particular district, or any railway, or section, or portion thereof, and the Board may exempt any railway, or portion thereof, from the operation of any such order or regulation, for such time, or during such period, as the Board deems expedient.

Penalties. 3. The Board may provide penalties, when not already provided in this Act, to which every company or person who offends against any regulation made under this section shall be liable, which shall not exceed one hundred dollars for each offence, and shall be recoverable on summary conviction. The imposition of any such penalty shall not lessen or affect any other liability which any company or person may have incurred. 51 V., c. 29, s. 10, 1 and 2, Am.

Power to review, etc. 4. The Board may review, rescind, change, alter or vary any rule, regulation, order or decision made by it, whether previously published or not. 51 V., c. 29, s. 18, Am.

PART. V.

PRACTICE AND PROCEDURE.

26. Every document purporting to be signed by the Chief Commissioner and Secretary, or by either of them, or by the Minister or inspecting engineer, shall, without proof of any such signature, be *prima facie* evidence in all courts, and shall be sufficient notice to the company and all parties interested (if served therewith in the manner herein provided for service of notice), that such document was duly signed and issued by the Board, Minister or inspecting engineer as the case may be; and if such document purports to be a copy of any regulation, order, direction, decision or report, made or given by the Board, or the Minister or inspecting engineer, shall be *prima facie* evidence in all courts of such regulation, order, direction, decision, or report, and when served on the company, or any person, in the manner in section twenty-eight provided for service of notice, shall be sufficient notice to the company or such person, of such registration, order, direction, decision or report from the time of such service. 51 V., c. 29, s. 26, Am.

Evidence of documents.

Service of copies.

27. Any document purporting to be certified by the Secretary as being a copy of any plan, profile, book of reference or any other document deposited with the Board, or of any portion thereof, shall, without proof of signature of the Secretary, be in all courts *prima facie* evidence of such original document, and that the same is so deposited, and is signed, certified, attested or executed by the persons by whom and in the manner in which. the same purports to be signed, certified, attested or executed, as shown or appearing from such certified copy, and also, if such certificate states the time such original was so deposited, that the same was deposited at the time so stated. 51 V., c. 29, s. 127, Am.

Certified plan, etc. *prima facie* evidence.

Certified copies of documents of Board. 2. A copy of any regulation, order or other document in the custody of the Secretary, or of record with the Board, certified by the Secretary to be a true copy, and sealed with the seal of the Board, shall, in all courts and for all purposes, be *prima facie* evidence of such regulation, order or document, without proof of signature of the Secretary.

Method of giving notices. 28. Any notice required to be given to the company, or to any company, municipality, corporation, co-partnership, firm or individual may be, and shall be deemed to be sufficiently given or served by delivering the same, or a copy thereof;

To railway companies. (a.) in the case of the company, to the president, vice-president, managing director, secretary or superintendent of the company, or to some adult person in the employ of the company at the head or any principal office of the company;

To municipalities, etc. (b.) in the case of any municipality, or civic or municipal corporation, to the mayor, warden, reeve, secretary, treasurer, clerk, chamberlain or other principal officer thereof;

To other companies. (c.) in the case of any other company, or body corporate, to the president, vice-president, manager or secretary, or to some adult person in the employ of the company at the head office of such company;

To firms. (d.) in the case of any firm or co-partnership, to any member of such firm or co-partnership, or left at the last place of abode of any such members with any adult members of his household, or at the office or place of business of the firm with a clerk employed therein;

To individuals. (e.) and, in the case of any individual, to him or left at his last place of abode with any adult member of his household, or at his office or place of business with a clerk in his employ;

Proviso. Provided that such notice is sufficient in substance, is given in sufficient time, and, in the case of the Board, is signed by the

Secretary or Chief Commissioner, in the case of the Minister or inspecting engineer, or other officer or person appointed by the Board or the Minister and required or authorized to give such notice, is signed by the Minister or by such inspecting engineer, officer or other person, as the case may be, and in the case of any company or corporation is signed by its president or secretary, or by its duly authorized agent or solicitor, and in the case of any person, is signed by such person, or his duly authorized agent or solicitor.

2. When in any of the cases mentioned in this section, it shall be made to appear to the satisfaction of the Board or Minister, as the case may be, under this Act, that service of such notice cannot be made in the manner provided in this section, or that the person to be served cannot be served, or that the company or person to be served is seeking to evade service and therefore cannot be served, the Board or Minister, as the case may be, may order and allow such service to be made by the publication of such notice for any period not less than three weeks in *The Canada Gazette*, and also, if required, in any other newspaper or newspapers, and service by such publication shall be deemed to be as sufficient as if the same had been served in the manner provided in the first part of this section.

3. Any regulation, order, direction, decision, report or other document may, unless in any case otherwise provided, be served in like manner as notice may be given under this section. 51 V., c. 29, s. 28, Am.

29. The company shall, as soon as possible after the receipt by it, or service upon it, of any regulation, order, direction, decision, notice, report or other document of the Board, or the Minister, or the inspecting engineer, give cognizance thereof to each of its officers and servants performing duties which are or may be affected thereby, by delivering a copy to him or by posting up a copy thereof in some place where his work or his duties, or some of them, are to be performed. 51 V., c. 29, s. 25, Am.

Publication of regulation and orders. 30. Publication by the Board, or by leave of the Board, for three weeks in *The Canada Gazette* of any rule, regulation, order or decision of the Board, shall be sufficient notice thereof to the company, to all persons, and to the public generally; and when such rule, regulation, order or decision, is so published, the same, while in force, shall have the like effect as if enacted herein, and all courts shall take judicial notice thereof.

Judicial notice. Notice of application. Board may vary length of time. 31. Except in any case where it is otherwise provided, ten days' notice of any application to the Board, or of any hearing by the Board, shall be sufficient, unless in any case the Board directs longer notice. The Board may in any case, allow notice for any period less than ten days which shall be sufficient notice as if given for ten days or longer.

Procedure in urgent cases when no notice given. Rehearing on application made within ten days after notice served. 32. When the Board is authorized to hear an application, complaint or dispute, or make any order, upon notice to the parties interested, it may, upon the ground of urgency, or for other reason appearing to the Board to be sufficient, notwithstanding any want of, or insufficiency in, such notice, make the like order or decision in the matter as if due notice had been given to all parties; and such order or decision shall be as valid and take effect in all respects as if made on due notice; but any person entitled to notice and not sufficiently notified may, at any time within ten days after becoming aware of such order or decision, or within such further time as the Board may allow, apply to the Board to vary, amend or rescind such order or decision, and the Board shall thereupon, on such notice to other parties interested as it may in its discretion think desirable, hear such application, and either amend, alter or rescind such order or decision, or dismiss the application, as may seem to it just and right.

Regulations and orders of Railway 33. All regulations and orders made by the Railway Committee of the Privy Council, under the provisions of *The Railway Act* and amending Acts, in force at the time of the passage

of this Act, shall continue in force until repealed, rescinded, changed or varied under the provisions of this Act; and the Board shall have the like powers to repeal, rescind, change or vary the same, as in the case of regulations or of orders which the Board may make under this Act.

“Notwithstanding anything contained in The Railway Act, 1903, the Governor-in-Council shall have, and shall be deemed to have had since the date upon which the said Act came into force, power, authority and jurisdiction to sanction, confirm, rescind, change or vary, or to take other action upon, any report, order or decision of the Railway Committee of the Privy Council made before the said date under The Railway Act of 1888, or any Act in amendment thereof, in as full and ample a manner as if The Railway Act, 1903, had not been passed, or had not come into force, and as if the said Railway Act of 1888 and the said Acts in amendment thereof had not been repealed; and any order or decision so sanctioned or confirmed shall have the same validity, force and effect as if the said order or decision had been so sanctioned or confirmed prior to the passing of The Railway Act, 1903.” (4 Edw. VII., cap. 32, sec. 1.)

The sanction of the Governor-in-Council was required to an order of the Railway Committee made under section 187 of the Act of 1888. Without such sanction an Order of the Committee was not *in force* and could not be dealt with by the Board. To meet the case of such orders, section 1 of 4 Edw. VII., cap. 32, as above set forth, was passed, providing that the Governor-in-Council might still exercise his powers under the previous Act.

34. Notwithstanding the repeal by this Act of the said *The Railway Act* and amending Acts, all orders of the Railway Committee of the Privy Council in force at the time of the passage hereof, may be made rules or orders of the Exchequer Court, or of any Superior Court of any province in Canada, and may be enforced in all respects, as near as may be, in the manner as provided by this Act in the case of similar orders by the Board; and all penalties, forfeitures and liabilities attaching, under this Act, to the violation of any regulation, or disobedience to any order of the Board, shall apply and attach to any violation of, or dis-

Existing orders of Railway Committee may be made rules of court.

Penalties under this Act

order or decision of the Board rescinding or changing the same shall be deemed to cancel the rule, order, or decree of such court, and may, in like manner, be made a rule, order or decree of court.

Sub-section 2 and 3 are new and the Board under sub-sec. 2 may apparently act *ex parte*.

36. The Board may provide in any order that the same, or any specified portion or terms thereof, shall come into force, at a future fixed time, or upon the happening of any specified contingency, event or condition precedent, or upon the performance to the satisfaction of the Board, or person named by it, of any terms which the Board may impose upon any party interested, and it may provide that the whole, or any portion of such order, shall have force for a limited time, or until the happening of any specified event. The Board may, instead of making an order final in the first instance, make an *interim* order, and reserve further order and direction to be made, either at an adjourned hearing of the matter, or upon further application.

Contingent orders.
Subject to terms.
Limited as to time.
Interim orders.

This is a new section and enlarges the powers of the Board as to making contingent temporary or *ex parte* orders beyond those of the Railway Committee under the Act of 1888.

See *Grand Trunk R.W. Co. v. Toronto*, 1 Can. Ry. Cas. 92.

37. Upon any application made to the Board under this Act, the Board may make an order granting the whole, or part only, of such application, or may grant such further, or other relief, in addition to, or substitution for, that applied for, as to the Board may seem just and proper, as fully in all respects as if such application had been for such partial, other, or further relief.

May grant partial or other relief than that applied for.

38. Whenever the special circumstances of any case seem to so require, the Board may make an *interim ex parte* order authorizing, requiring or forbidding anything to be done which the

Interim ex parte orders.

Proviso. Board would be empowered on application, notice and hearing to authorize, require or forbid. No such *interim* order shall, however, be made for any longer time than the Board may deem necessary to enable the matter to be heard and determined.

Ex-
tension
of time
specified
in order.

39. When any work, act, matter or thing is by any regulation, order or decision of the Board required to be done, performed or completed within a specified time, the Board may, if the circumstances of the case seem to so require, upon notice and hearing, or in its discretion upon *ex parte* application, extend the time so specified.

May
make
rules
govern-
ing its
procedure
and
practice.
When to
be judi-
cially
noticed.
Amend-
ments.

40. The Board may make general rules governing, so far as shall not be inconsistent with the express provisions of this Act, its practice and procedure under this Act, and generally for carrying this Act into effect. Such rules may be published in *The Canada Gazette*, and shall thereupon be judicially noticed, and shall have effect as if they were enacted in this Act. The Board may, upon terms or otherwise, make or allow any amendments in any proceedings before it.

General rules were made and promulgated by the Board on the 18th of October, 1904, and are published in the appendix.

Presump-
tion of
jurisdic-
tion to
make
order.

41. No order of the Board need show upon its face that any proceeding or notice was had or given, or any circumstance existed, necessary to give it jurisdiction to make such order.

Judg-
ments of
other
courts on
questions
of fact
not bind-
ing upon
Board.

42. In determining any question of fact, the Board shall not be concluded by the finding or judgment of any other court, in any suit, prosecution or proceeding, involving the determination of such fact, but such finding or judgment shall, in proceedings before the Board, be *prima facie* evidence only.

2. The pendency of any suit, prosecution or proceeding, in any other court, involving questions of fact, shall not deprive the Board of jurisdiction to hear and determine the same questions of fact.

Jurisdiction of Board not affected by collateral suits.

3. The finding or determination of the Board upon any question of fact within its jurisdiction shall be binding and conclusive on all courts.

Finding of Board on questions of fact conclusive.

The decisions of the Railway and Canal Traffic Commission since its commencement are binding on the Commission as a Court: *Didcot, etc., R.W. Co. v. Great Western R.W. Co.*, 9 Ry. & C. Tr. Cas. 210, at p. 229; *Pickford's Co. v. London & North Western R.W. Co.*, 21 T.L.R. 223.

43. The Board may, of its own motion or upon the application of any party, and upon such security being given as it directs, state a case, in writing, for the opinion of the Supreme Court of Canada upon any question which in the opinion of the Board is a question of law. A like reference may also be made at the request of the Governor-in-Council. 51 V., c. 29, s. 19, Am.

May state case for opinion of Supreme Court of Canada.

2. The Supreme Court of Canada shall hear and determine the question or questions of law arising thereon, and remit the matter to the Board with the opinion of the court thereon. 51 V., c. 29, s. 20, Am.

Action thereon.

In considering when a case upon a question of law can be submitted for the opinion of the Supreme Court, the enquiry is suggested, —What is a question of law?

The distinction between law and fact is subtle, and sometimes a question of no little difficulty. The difficulty lies not in determining what the law is, or what the fact is, but whether the given law is applicable to the given fact. (Austin on Jurisprudence, 1873, Vol. 1, p. 236.)

As examples of questions of law arising for decision upon findings of fact by a County Court Judge, under the Workmen's Compensation Act, 1897 (Imp.), 60 & 61 Viet., cap. 37, see

Hodinott v. Newton (1901), A.C. 49, p. 68, where the construction constituting a scaffolding within the meaning of section 7 of the Act was treated as a question of law. Also *Maud v. Brook* (1900), 1 Q.B. 581.

Whether a bicycle was a carriage within the meaning of the Highway Act was treated as a question of law in *Taylor v. Goodwin*, 4 Q.B.D. 228.

The law is the rule or standard, but the facts are the varying circumstances which conform or not with such rule or standard. It is a question of law (1) where any such rule or standard exists; (2) whether, if such rule or standard exists, the state of facts found by the inferior court falls within such rule or standard. See *Roper v. Greenwood* (1900), 83 L.T. 471.

The meaning of words in an Act of Parliament is a question of law, not a matter of evidence. The legal meaning, i.e., the proper construction to be placed upon words or sentences in a statute, does not necessarily coincide with the ordinary meaning. e.g., the word "place" in a statute forbidding betting in any "house, office, room or other place." *Powell v. Kempton Park Co.* (1897), 2 Q.B. 242.

Definitions are often the subject of legal argument: as "cruelty" in *Russell v. Russell* (1897), A.C. 395.

In Boulton on "The Law and Practice of a Stated Case," (1902), pp. 120-129, a number of cases are given of questions of law, e.g.,

Milner v. Great Northern R.W. Co. (1900), 1 Q.B. 795. Whether a refreshment room at a station was part of the railway station.

Cf. "Railway station," *Carroll v. Casemore*, 20 Grant 16. whether a bookstall at a station, consisting of a board and trestles, was a shop within the meaning of the Shop Hours Act. 1892, 55 & 56 Vict., cap. 62.

"Minerals," *Scott v. Midland R.W. Co.* (1901), 1 K.B. 317. 70 L.J.Q.B. 228.

See "Words and Terms," Digest of Ontario Law (1904). Vol. IV., pp. 7707-43; Stroud's Judicial Dictionary (1903), 2nd Edition.

By section 253 (2), the Board may determine, *as questions of fact* what are "substantially similar circumstances," "undue preferences," etc., etc., within the meaning of the Act.

44. Subject to the provisions of this section, every decision or order of the Board shall be final. Order of Board final.

2. The Governor-in-Council may, at any time, in his discretion, either upon petition of any party, person or company interested, or his own motion and without any petition or application therefor, vary, change or rescind any order, decision, rule or regulation of the Board, whether such order or decision be made *inter partes* or otherwise, and whether such regulation be general or limited in its scope and application; and any order which the Governor-in-Council may make with respect thereto shall be binding on the Board and all parties. Saving right of review by Governor-in-Council.

3. An appeal shall lie from the Board to the Supreme Court of Canada upon a question of jurisdiction, but such appeal shall not lie unless the same is allowed by a judge of the said court upon application and hearing the parties and the Board; the costs of such application shall be in the discretion of the judge. Appeal to Supreme Court on questions of jurisdiction.

An appeal shall also lie from the Board to such court upon any question which in the opinion of the Board is a question of law, upon leave therefor having been first obtained from the Board. The granting of such leave shall be in the discretion of the Board. On questions of law.

4. Upon such leave being obtained the party so appealing shall deposit with the registrar of the Supreme Court of Canada the sum of two hundred and fifty dollars, by way of security for costs, and thereupon the registrar of such court shall set the appeal down for hearing on the first day of the next session; and the party appealing shall within ten days after the deposit, give to the parties affected by the appeal, or their respective solicitors by whom such parties were represented before the Board, and to the Secretary, notice in writing that the case has been so set down to be heard in appeal as aforesaid; and the said appeal shall be heard by such court as speedily as practicable. Security for costs
Notice of appeal.

Opinion
of court†.

5. On the hearing of any such appeal the Supreme Court of Canada may draw all such inferences as are not inconsistent with the facts expressly found by the Board, and are necessary for determining the question of *jurisdiction*, or law, *as the case may be*, and shall certify their opinion to the Board, and the Board shall make an order in accordance with such opinion.

Compare the Railway and Canal Traffic Act, 1888, 51 & 52 Vict., cap. 25, sec. 17 (4) (Imp.), from which this sub-section is largely taken. The portions in italics have been added, the concluding portion omitted, “shall have all such powers for that purpose as if the appeal were an appeal from a judgment of a Superior Court, and may make any order which the Commissioners could have made and also any such further or other order as may be just, and the costs of and incidental to the appeal shall be in the discretion of the Court of Appeal, but no Commissioner shall be liable to any costs by reason or in respect of any appeal.”

Board
may be
heard by
counsel.

6. The Board shall be entitled to be heard, by counsel or otherwise, upon the argument of any such appeal.

There is no provision for representation of the Board before the Governor-in-Council in a proceeding under sub-section 2.

Rules of
court as
to costs,
etc.

7. The Supreme Court of Canada shall have power to fix the costs and fees to be taxed, allowed and paid upon such appeals, and to make rules of practice respecting appeals under this section, and until such rules are made the rules and practice applicable to appeals from the Exchequer Court to the Supreme Court of Canada shall be applicable to an appeal under this Act.

Members
of Board
not liable
for costs.

8. Neither the Board nor any member of the Board shall in any case be liable to any costs by reason or in respect of any appeal or application under this section.

Proceed-
ings of
Board
final, ex-
cept as
above.

9. Save as provided in this section, an order, decision or proceeding of the Board shall not be questioned or reviewed, restrained or removed by prohibition, injunction, certiorari, or any other process or proceeding in any court. Sub. for 51 V., c. 29, s. 21.

In the English Act the Crown is expressly mentioned in addition, see section 17, sub-section 6. The usual rule is that the King is not bound by any statute, if he be not expressly named so as to be bound. Broom's Legal Maxims, 7th Edition, pp. 56 *et seq.*

45. The Governor-in-Council may at any time refer to the Board for a report, or other action, any question, matter or thing arising, or required to be done, under this Act, or the Special act, and the Board shall without delay comply therewith. Governor-in-Council may refer to Board for report.

46. The costs of and incidental to any proceedings before the Board shall be in the discretion of the Board, and may be fixed in any case at a sum certain, or may be taxed. The Board may order by whom and to whom the same are to be paid, and by whom the same are to be taxed and allowed. Costs.

2. The Board may prescribe a scale under which such costs shall be taxed. Scale of costs.

47. When the Board, in the exercise of any power vested in it by this Act, or the Special Act, in and by any order directs any structure, appliances, equipment, works, renewals, or repairs to be provided, constructed, reconstructed, altered, installed operated, used or maintained, it may order by what company, municipality or person, interested or affected by such order, as the case may be, and when or within what time, and upon what terms and conditions as to the payment of compensation or otherwise, and under what supervision, the same shall be provided, constructed, reconstructed, altered, installed, operated, used or maintained; and the Board may order by whom, in what proportion, and when, the cost and expenses of providing, constructing, reconstructing, altering, installing and executing such structures, equipment, works, renewals, or repairs, or the supervision (if any), or the continued operation, use or maintenance of the same, or of otherwise complying with such order, shall be paid. Expenses of works ordered by Board
Board may order by whom to be constructed and paid.

Read in this connection section 23 (2) providing that the decision of the Board as to whether any company, municipality or person is, or is not, a party interested, shall be binding and conclusive.

Occasion for exercise of the powers of the Board, under this section, as of the Railway Committee under the Act of 1888 in similar cases, will most frequently arise under sections 186 and 187.

See *Re Canadian Pacific R.W. Co. and Township and County of York*, 1 Can. Ry. Cas. 36-47; 27 O.R. 559; 25 A.R. 65.

Board
may
order in-
quiries.

48. The Board may appoint or direct any person to make an inquiry and report upon any application, complaint or dispute pending before such Board, or any matter or thing over which the Board has jurisdiction under this or the Special Act. 51 V., c. 29, s. 12, Am.

Minister
may
order
inquiry.

2. The Minister may, with the approval of the Governor-in-Council, appoint and direct any person to inquire into and report upon any matter or thing which the Minister is authorized to deal with under this Act or the Special Act.

Powers
respect-
ing in-
quiries.

49. The Board, the Minister, inspecting engineer, or person appointed under this Act to make inquiry or report may:—

Entry.

(a.) enter upon and inspect any place, building, or works, being the property or under the control of any company, the entry or inspection of which appears to it or him requisite;

Inspe-
ction.

(b.) inspect any works, structure, rolling stock or property of the company;

Attend-
ance of
witnesses
and
replies.

(c.) require the attendance of all such persons as it or he thinks fit to call before it or him, and examine, and require answers or returns to such inquiries as it or he thinks fit to make;

Produce-
tion of
docu-
ments,
etc.

(d.) require the production of all books, papers, plans, specifications, drawings and documents, relating to the matter before it or him;

(e.) administer oaths, affirmations or declarations;

Oaths.

2. And shall have the like power in summoning witnesses and enforcing their attendance, and compelling them to give evidence and produce books, papers or things which they are required to produce, as is vested in any court in civil cases. 51 V., c. 29, ss. 13 and 15, Am.

50. Every person summoned to attend before the Board or the Minister, or before any inspecting engineer, or person appointed under this Act to make inquiry and report shall, in the discretion of the Board or the Minister, receive the like fees and allowances for so doing as if summoned to attend before the Exchequer Court. 51 V., c. 29, s. 16, Am.

2. No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Board, or in obedience to the subpoena or order of the Board, or of any person authorized to hold any investigation or inquiry under this Act, or in any cause or proceeding based upon or growing out of any alleged violation of this Act, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to any proceeding or penalty; but no evidence so given, nor any document so produced, shall be used or receivable against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence.

3. In any proceeding before the Board and in any action or proceeding under this Act, every written or printed document purporting to have been issued or authorized by the company, or any officer, agent, or employee of the company, or any other person or company for or on its behalf, shall, as against the company, be received as *prima facie* evidence of the issue of such document by the company and of the contents thereof without any further proof than the mere production of such document.

PART VI.

INCORPORATION AND ORGANIZATION OF COMPANY.

Incorporation, 51.

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President and directors, 68 to 84.

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Shares, 95 to 110.

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Incorporation.

Compan-
ies to
have cor-
porate
powers.

51. Every company incorporated under a special Act shall be a body corporate, under the name declared in the Special Act, and shall be vested with all such powers, privileges and immunities as are necessary to carry into effect the intention and objects of this Act, and of the Special Act, and which are incident to such corporation, or are expressed or included in *The Interpretation Act*. 51 V., c. 29, s. 31.

The following provisions of the *Interpretation Act*, R.S.C., cap. 1, sec. 7, are more particularly applicable to corporations. In sub-sec. (22) the word "person" includes any body corporate and politic and their legal representatives.

Sub-sec. (43). Words creating any association or number of persons into a corporation or body politic and corporate shall vest in them power to sue and be sued, contract and be contracted with by their corporate name, to have a common seal and to alter the same at their pleasure, to have perpetual succession and power to acquire and hold personal property or moveables for the purposes for which the corporation is constituted, and to

alienate the same and shall also vest in the majority of the members the power to bind the others by their acts and shall exempt the individual members of the corporation from personal liability for its debts, obligations or acts provided they do not violate the provisions of the act incorporating them. But no corporation shall carry on the business of banking unless when such powers are expressly conferred upon them by the act creating such corporation. With this section may be compared Blackstone's enumeration of the ordinary capacities and incidents of corporations quoted in Brice on *Ultra Vires*, 3rd Ed., p. 3.

Sub-sec. (45). Deals merely with the power to make, revoke, and alter by-laws. See notes to sec. 2. sub-sec. b, *supra*.

Sub-sec. (50). Providing that all by-laws, etc., made under repealed acts shall continue good and valid so far as they are not inconsistent with the substituted act until they are annulled or others are made in their stead.

Name of Corporation. In Manitoba it has been held that a misnomer or variation from the true name of a corporation in any grant or obligation by or to it is not material if the identity of the corporation is unmistakable: *McRae v. Corbett*, 6 Man. L.R. 426. And if the opposite party in an action desires to set up misnomer he must object by application in chambers to compel the company to amend and cannot set it up as ground for a non-suit: *G.N.W. Tel. Co., v. McLaren*, 1 Man. L.R. 358, and see *Waterous v. McLean*, 2 Man. L.R. 279. In England the Courts have restrained the use by one company of the name granted by its Letters Patent when it has been convinced that that name was used for the purpose of unfair competition with another who had already built up a connection in the same line of business under a similar name: *North Cheshire, etc., Co. v. Manchester Brewing Co.* (1898), 1 Ch. 539, (1899), A.C. 83; *Randall v. The British American Shoe Co.* (1902), 2 Ch. 354; *Montreal Lithographing Co. v. Sabiston*, Q.R. 6, Q.B. 510 (1899). A.C. 610.

Joint Stock Company. A railway company incorporated by Special Act will come sufficiently within the definition Joint Stock Company, which term may be used interchangeably with "corporation" and "company." The designation joint stock being used to distinguish such companies from private partnerships and corporations which have no stock or shares such as

syndicates, ecclesiastical bodies, trustees, etc.: *Hamilton v. Stewiacke, etc.*, R.W. Co., 30 N.S.R. 10, at p. 13.

Powers of Railway Companies. The leading principles on the subject of powers of companies generally are set out in cap. 5 on Brice on *Ultra Vires*, 3rd Ed., pp. 60 and 61, quoted Masten on Company Law, p. 89.

As a general rule a company unless specially incorporated for that purpose cannot engage in business as a railway company: *Ashbury Carriage Company v. Riche*, L.R. 9 Ex. 224, 249, L.R. 7 H.L. 653.

The following remarks of Lord Cairns in the above case in the House of Lords, at p. 667, explain the reason for this rule. "Your Lordships are well aware that this is the Act (Joint Stock Company's Act of 1862) which put upon its present permanent footing the regulation of joint stock companies and more especially of those joint stock companies which were to be authorized to trade with a limit to their liability. The provisions under which that system of limiting liability was inaugurated were provisions not merely perhaps I might say, not mainly, for the benefit of the shareholders for the time being of the company, but were enactments intended also to provide for the interests of two other very important bodies; in the first place those who might become shareholders in succession to the persons who were shareholders for the time being; and secondly, the outside public, and more particularly those who might be creditors of companies of this kind." It was therefore held in that case that even though a company was empowered to build railway cars and other rolling stock and carry on business as "general contractors" they have no power to build a railway. In *Charlebois v. Delap*, 26 S.C.R. 221, the same principle is laid down as follows: "A company incorporated for definite purposes has no power to pursue objects other than those expressed in its charter or such as are reasonably incidental thereto; nor to exercise their powers in the attainment of authorized objects in a manner not authorized by the charter." Affirmed as to this, (1899), A.C. 114. This case decided that a company had no power to enter into a contract with one of its directors for the purchase of shares and for the payment of a bonus to him, but such contract was invalid as being beyond the powers of the company even though authorized and approved of by every shareholder, that it was equally impossible

to ratify such a contract after it was made and that a judgment obtained by consent based upon this contract cannot stand where the question of *ultra vires* was not litigated and the point was not presented to the court. For this see report of the above case (1899), A.C., at p. 124, as follows: "It is quite clear that a company cannot do what is beyond its legal powers by simply going into court and consenting to a decree which orders that the thing shall be done. If the legality of the Act is one of the points substantially in dispute that may be a fair subject of compromise in court like any other disputed matter; but in this case both the parties, plaintiff or defendant in the original action and in the cross action, were equally insisting on the contract * * * Such a judgment cannot be of more validity than the invalid contract on which it was founded." These principles govern equally whether the company is acting under a Special Act of Parliament or under Letters Patent granted by the Crown: *Attorney-General v. Great Eastern R.W. Co.*, 5 A. C., p. 473.

Acts Ultra Vires in England. It has been held that the railway company may not apply its funds to promote a bill in Parliament for extended powers: *East Anglian R.W. Co. v. Eastern Counties R.W. Co.*, 11 C.B. 775. And see cases cited Browne and Theobald, 3rd Ed., p. 96. Nor can it expend its funds in prosecuting a suit instituted by a shareholder on behalf of himself and all other shareholders against the company and its directors to make the latter liable for improper dealings with the company's property: *Kernaghan v. Williams*, 6 Eq., 228; *Studdert v. Grosvenor*, 33 Ch. D. 529; and litigation between different members of the company cannot be paid for by the company: *Pickering v. Stephenson*, 14 Eq. 322; *Smith v. Manchester*, 24 Ch. D. 611. Funds raised for constructing new lines may not be applied upon the original line: *Bagshaw v. Eastern Union R.W. Co.*, 2 McN. & G. 389. Nor can a company authorized to build a line between two termini and having to raise money for that purpose abandon a portion of the line and apply the money for other purposes: *Cohen v. Wilkinson*, 12 Beav. 138, 1 McN. & G. 481, *Graham v. Birkenhead, etc., R.W. Co.*, 12 Beav. 460.

Nor may a company purchase the shares of another company: *Salomons v. Laing*, 12 Beav. 339.

Nor may it work coal mines or deal in coal for the purpose of profit: *Attorney-General v. Great Northern R.W. Co.*, 8

W.R. 556; although past workings of coal may be impliedly legalized by Act of Parliament: *Ecclesiastical Commrs. v. North Eastern R.W. Co.*, 4 Ch. D. 845.

Subscriptions to public or charitable organizations have been held *ultra vires*, even though the organization might increase passenger traffic: *Tomkinson v. South Eastern R.W. Co.*, 35 Ch. D. 675.

Nor may a company alienate its land other than superfluous land, or grant a right of way over it: *Bostock v. North Staffordshire R.W. Co.*, 4 E. & B., 798, followed by *Mulliner v. Midland R.W. Co.*, 11 Ch. D. 611.

Nor may a railroad company not expressly authorized purchase steam boats for the purpose of carrying passengers to another railway: See *Colman v. Eastern Counties R.W. Co.*, 10 Beav., 1; although the contrary was held in *South Wales R.W. Co. v. Redmond*, 10 C.B.N.S. 675. See this discussed in Brice *Ultra Vires*, 3rd Ed., p. 127, note 1, and in the absence of special legislative sanction to the contrary dividends must be paid in money not in shares: *Hoole v. Great Western R.W. Co.*, L.R. 3 Ch. 262, followed by *Wood v. Odessa Co.*, 42 Ch. D. 636; although the contrary is the rule in the United States: Brice, p. 347. The funds of the company may not be employed in buying up opposition to a bill: *Scottish, etc., R.W. Co. v. Stewart*, 3 Macq. 382. The following acts have been held in England to be within the powers of railway companies: Providing funds to oppose a dangerous bill: *Attorney-General v. Andrews*, 2 McN. & G. 225; *Attorney-General v. Mayor of Brecon*, 10 Ch. D. 204. Laying down a narrow gauge as well as a broad gauge line of rails: *Beman v. Rufford*, 15 Jur. 914. A railway company bound to supply ferry boats may employ these boats in excursions to places not mentioned in its acts when not wanted for the ferry: *Forest v. Manchester R.W. Co.*, 30 Beav. 40.

A company possessing rolling stock not required for its immediate purposes may let the same to other companies: *Attorney-General v. Great Eastern R.W. Co.*, 11 Ch. D. 449, 5 A.C. 473, and so one company may agree to supply another company tributary to it with such rolling stock as it may require even though this may involve the manufacture of rolling stock by the former company in excess of its own wants: *Attorney-*

General v. Great Eastern R.W. Co., supra. And so a company may give gratuities to its servants or directors: *Hutton v. West Cork R.W. Co.*, 23 Ch. D. 654.

And although it may be forbidden by Act of Parliament to grant a preference to one customer over another, yet the act is not *ultra vires* and cannot be restrained in an action brought by the shareholder against the company on the ground that it is acting beyond its powers: *Anderson v. Midland R.W. Co.* (1902), 1 Ch. 369.

In an important municipal case in England, *London County Council v. Attorney-General and others* (1901), 1 Ch. 781, (1902), A.C. 165, it was held that where a county council had power to purchase and work tramways this would not empower it to run omnibuses in connection therewith. The omnibus business not being incidental to the tramway business.

Acts Ultra Vires in Canada. One railway company without express statutory authority has no power to agree to build the line of another railway: *Great Western R.W. Co. v. Preston, etc.*, R.W. Co., 17 U.C.R. 477. Nor can one railway grant running rights over its line to another after the time for completing its undertaking has expired: *The Carlton, etc., R.W. Co. v. Great Southern R.W. Co.* (N.B.), 2 Can. L.T. 406, 21 N.B.R. 339. And it also seems from this case that though one railway might grant to another a right to connect with it and have a running power over it, it would have no power to grant to another a right to construct a separate track alongside its own.

A Bridge Company empowered to build a bridge and charge tolls to any railway desiring to use it has no right to grant exclusive privileges to one railway: *Attorney-General v. Niagara Falls Bridge Company*, 20 Gr. 34. And a contract to pay one of the directors a bonus upon the purchase of stock by him is *ultra vires*: *Charlebois v. Delap*, 26 S.C.R. 221, (1899), A.C. 114.

A railway company cannot grant an easement across railway lands even by resolution or deed: *Canada Southern R.W. Co. v. Niagara Falls*, 22 O.R. 41. Nor can any one acquire an easement over such lands by prescription: *Guthrie v. Canadian Pacific R.W. Co.*, 1 Can. Ry. Cases pp. 1 and 9. Nor can a railway company without express statutory authority sell lands acquired by it for the purposes of the railway: *Pratt v. Grank Trunk R. W. Co.*, 8 O.R. 499; and see also *Mulliner v. Midland R.W. Co.*, 11 Ch. D. 611.

Where a railway company had given a bond to secure payment of compensation for lands expropriated pursuant to provincial statute and had afterwards been declared to be work for the general advantage of Canada it was held that it had no power to enter into such bond or continue its obligation thereunder and must pay money into court pursuant to the Dominion Railway Act: *Nihan v. St. Catharines, etc., R.W. Co.*, 16 O.R. 459.

A railway company which has constructed its line between the termini mentioned in the statute may not thereafter build beyond it without obtaining legislative authority: *Kingston & Pembroke R.W. Co. v. Murphy*, 11 O.R. 302, 582, 17 S.C.R. 582.

Acts Intra Vires in Canada. The following acts have been held to be *intra vires* of railway companies in Canada. To mortgage its lands even though the mortgage is wider than the terms of its statutory authority: *Bickford v. Grand Junction R. W. Co.*, 1 S.C.R. 696; *Charlesbois v. Great North West Central R.W. Co.*, 9 Man. L.R. 1. And see further as to this and as to power to sign notes and bills, the notes to section 11, *infra*.

The Canadian Pacific Railway Company may, under its act of incorporation, 44 Viet., cap. 1(D.), build beyond the terminus mentioned in that statute: *Edmonds v. Canadian Pacific R.W. Co.*, 1 B.C.R., Pt. II., 272, 295; *Major v. Canadian Pacific R.W. Co.*, *Ibid*, 287, and *Canadian Pacific R.W. Co. v. Major*, 13 S.C.R. 233. Compare with this *Kingston & Pembroke R.W. Co. v. Murphy, supra*. It has been also held that that railway and probably all railways authorized to do business by the Dominion of Canada in any province of the Dominion may hold lands in that province without obtaining a license from the local Government: *Re Canadian Pacific R.W. Co.*, 7 Man. L.R. 389. Railway companies may also enter into an agreement in the nature of the Joint Traffic Agreements with other railways or carrying companies even in the absence of express statutory authority: *Canadian Pacific R.W. Co. v. Owen Sound Steamship Co.*, 17 O.R. 691, 17 A.R. 482; and the fact that such agreements may be in fact a pledge of part of its earnings to another company will not vitiate the transaction: S. C. The Canada Southern R.W. Co. had power under its statutes and possibly under the general law to lease its line to another railway company even though the latter was incorporated in a foreign country: *Welicans v. Canada Southern R.W. Co.*, 21 A.R. 297, and *Michigan*

Central R.W. Co. v. Welleans, 24 S.C.R., 309. But without express statutory authority a railway company cannot lease the concern or delegate its powers to another company for a specified term: *Hinckley v. Gildersleeve*, 19 Gr. 212.

How Illegal Acts may be Restrained. Where an act is illegal and causes an injury to a private person differing from that suffered by the public the cases above cited show that the latter may apply for an injunction. See also Browne and Theobald, 3rd Ed., p. 98; so also shareholders who can show that they are suffering by *ultra vires* action of the company may apply for an injunction.

But where it is sought to restrain *ultra vires* proceedings on the ground that they are a public injury such action should be taken by the Attorney-General: Brice, p. 751; Browne and Theobald, p. 98; *Attorney-General v. Great Northern R.W. Co.*, 6 Jur. 1006; *Attorney-General v. Bergen*, 29 N.S.R. 135. Where it is alleged by a shareholder that the directors of the company are acting improperly and beyond their powers an action to restrain their doing so must be brought in the name of the company and not by a shareholder on behalf of themselves and other shareholders: *McMurray v. Northern R.W. Co.*, 23 Grant 134. Where an application is made by the Attorney-General to restrain illegal acts it is not necessary to show any pecuniary loss thereby. All that is necessary is to show some breach of a statutory obligation: *Attorney-General v. Ryan*, 5 Man. L.R. 81; *Attorney-General v. London and North Western R.W. Co.* (1899), 1 Q.B. 72; (1900), 1 Q.B. 78.

The jurisdiction of the Attorney-General to decide in what cases it is proper for him to sue on behalf of relators where a complaint of this character is made is absolute: *London County Council v. Attorney-General* (1902), A.C. 165. Where by an act extending the powers of a company certain obligations were imposed upon it for the benefit of customers but no pecuniary penalty was imposed for default and no right of action given to persons aggrieved; it was held that no individual customer had a right of action against the company but in case of any breach of its statutory duties the action must be brought in the name of the municipality with whom the agreement legalized by the statute was made: *Johnston v. Consumers' Gas Co.* (1898), A.C. 447.

Money Received Under Ultra Vires Contract. Where a company receives money belonging to another upon a contract which is *ultra vires*; the person entitled to it may recover from the company in an action upon the common counts: *Brockville & Ottawa R.W. Co. v. Canada Central R.W. Co.*, 41 U.C.R. 431; but the officers of a company who thus accept money for a purpose which the company has no power to carry out may be charged by the shareholders with it: *Walmsley v. Rent Guarantee Co.*, 29 Gr. 484.

Offices.

Head office. 52. The head office of the company shall be in the place designated in the Special Act, but the company may, by by-law, from time to time, change the location of its head office to any place in Canada, notice thereof to be given to the Secretary of the Board who shall keep a register for the purpose. The directors of the company may establish one or more offices in other places in Canada or elsewhere. 51 V., c. 29, s. 32, Am.

Change of location.

Offices.

Change of Head Office. Compare 8 Vict., cap. 16, sec. 135 (Imp.). Under this section it is now possible for a company by by-law to change its head office from one place to another in Canada provided the notice mentioned in that section is given. Formerly a railway company could not change its head office from the place specified in the Special Act incorporating it except by legislation amending the previous Act. In *Union Fire Insurance Co. v. O'Gara*, 4 O.R. 359, where a company had by its Act power to change its head office to such other place as might be determined by the shareholders at a general meeting a resolution was passed at the general annual meeting for the removal of the head office from Ottawa to Toronto. The directors made the change and the subsequent annual meetings were held at Toronto at the first of which the by-law referring to the place of holding the annual meetings was amended by substituting "Toronto" for "Ottawa" and it was held that the change was effectually made. The objection which had been made in that case was that the shareholders could not depute to the directors power to consummate the arrangements for a change, but should themselves have passed a resolution declaring the change to be effected; but this objection was over-ruled.

Service on Corporation. Before the present rules providing for service of corporations at any office at which they do business, difficult questions arose as to the method of service which ought to be adopted and it was laid down that a corporation was only domiciled at the place where its head office was situated and that service must be made at that place: See *Ralph v. Great Western R.W. Co.*, 14 Canada Law Journal 172; *Ahrens v. McGilligat*, 23 U.C.C.P. 171; *Westover v. Turner*, 26 U.C.C.P. 510; *Wilson v. Detroit & Milwaukee R.W. Co.*, 3 P.R. 37; *Taylor v. Grand Trunk R.W. Co.*, 4 P.R. 300; and it was held that service could not formerly have been effected upon a station agent at a subordinate though important station where the agent there acted under the direction of some authority at a central point: *Minor v. London & North Western R.W. Co.*, 1 C.B.N.S. 325; *Brown v. London & North Western R.W. Co.*, 4 B. & S. 326; *Palmer v. Caledonian R.W. Co.* (1892), 1 Q.B. 823. In the modern practice, however, the rules of practice in the various provinces generally provide that service may be made upon a railway company by serving certain named officers at its stations or offices in any such province and it is not now necessary therefore as a rule to serve a company at its head office where the same is outside the jurisdiction: *Tytler v. Canadian Pacific R.W. Co.*, 29 O.R. 654, 26 A.R., 467. This point was much discussed in *Lamont v. Canadian Pacific R.W. Co.*, 5 Terr. L.R. 60.

In England the rule is that a company may be served at any place where it may be found "doing business" or is "resident" and therefore it may be served wherever there is an agent who is authorized to transact business on behalf of the company, even though he does other business as well: *Haggin v. Comptoir D'Escompte*, 23 Q.B.D. 519, and *The Bourgogne* (1899), P. 1, and (1899), A.C. 431; *Dunlop v. Actien* (1902), 1 K.B. 345; and the same rule has been substantially applied in Ontario: *Wentworth v. Smith*, 15 P.R. 372; *Murphy v. Phoenix Bridge Co.*, 18 P.R. 406 and 495. And see also *Armstrong v. Lancashire Fire Insurance Co.*, 3 O.L.R. 395. Where in the charter of a railway company, such as the Canadian Pacific R.W. Co., 44 Vict. (D.), cap. 1, clause 9 of the schedule, it is directed that a railway company may by by-law appoint a place within each province at which service is to be effected and that service at that point should be as good as though made at the head office, it is doubtful whether such a provision for service is exclusive and over-rides the Rules

of Practice in force in the Province as to service or not. In British Columbia it has been held that service must be made at the place designated by by-law: *Jordan v. McMillan*, 8 B.C.R. 27; *Hansen v. Canadian Pacific Ry. Co.*, 8 B.C.R. 29; and the same rule has been laid down in the North-West Territories: *Lamont v. Canadian Pacific R.W. Co.*, 5 Terr. L.R. 60. But in the Province of Ontario it has been held that the schedule to that statute can not over-ride the general provisions in force in Ontario providing for service on corporations having their head office elsewhere: *Tytler v. Canadian Pacific R.W. Co.*, *supra*. Where a railway company has no head office within the Dominion of Canada it has been held in Manitoba that if it has an office and does business within that province it may be sued for work done there: *Crotty v. Oregon, etc., R.W. Co.*, 3 Man. L.R. 182.

Provisional Directors.

Provi- sional directors.	53. The persons mentioned by name as such in the Special
Majority quorum.	Act are hereby constituted provisional directors of the com- pany, and of such provisional directors a majority shall be a quorum, and the said provisional directors shall hold office as such until the first election of directors, and may forthwith open stock books and procure subscriptions of stock for the
Powers.	undertaking, and receive payments on account of stock sub- scribed, and cause plans and surveys to be made, and deposit
Deposit of moneys.	in any chartered bank of Canada moneys received by them on account of stock subscribed, which moneys shall not be with- drawn, except for the purposes of the undertaking, or upon the dissolution of the company for any cause whatsoever. 51 V., c. 29, s. 33.

General Remarks. This section and sec. 54 appear for the first time in the Consolidated Railway Act (1888), although in Special Acts it had been the practice for sometime before to state that certain named persons, generally the whole body of incorporators, who were frequently very numerous, should be provisional directors to hold office until the first meeting of shareholders and until the election of regular directors. See for instance the

Act incorporating the Grand Junction Railway, 17 Vict., cap. 43, which became the subject of discussion in *Peterborough v. Grand Trunk R.W. Co.*, 18 U.C.R. 220. In England it has never been the practice to appoint provisional directors and the term is not used: See *Michie v. Erie & Huron R.W. Co.*, 26 U.C.C.P. 566, at p. 573. Until incorporation and organization the work is carried on by "promoters" and in the Railway Construction Facilities Act (1864), 27 & 28 Vict., cap. 121, sec. 2, that term is defined and is constantly used throughout the statutes and the rights and liabilities of promoters are discussed in Browne & Theobald, 3rd Ed., pp. 537 and 538. These promoters until the organization is completed form themselves or some of their members into a "provisional committee" who become "provisional committeemen," whose duties and obligations are set forth in Browne & Theobald, 3rd. Ed., p. 538. In the earlier Canadian Acts incorporating railway companies no provisional directors were nominated but a date was set for a meeting of shareholders at which directors were to be elected who were then to elect their president and vice president: See *The London and Gore Railway Act*, 4 Wm. IV., cap. 29.

Powers of Provisional Directors. The status of provisional directors was first discussed in Ontario in *Re North Simcoe R.W. Co. and Toronto*, 36 U.C.R. 101. It was doubted by Gwynne, J., at p. 119, whether under the Special Act incorporating that company, provisional directors had any power to apply to compel a municipality to pay over a bonus which had been voted to the company. He thought their powers were limited to putting the Act of Incorporation into operation until the amount necessary to proceed to the election of the regular Board was subscribed and, in his opinion, the further carrying out of the project should rest with the regular Board. This case was affirmed on appeal, *Ibid*, p. 121, but the powers of provisional directors were not dealt with. In *Michie v. Erie & Huron R.W. Co.*, 26 U.C.C.P. 566, their powers were critically examined by Hagarty, C.J.C.P., who held in effect that as only one of fifty-one provisional directors had taken stock their acts must be carefully scrutinized, that while it was difficult to define the limits of the authority given by Parliament to them, it would appear that their duty was to take all necessary steps to get the company into proper working order, that it could hardly have been intended

to give a number of persons not shareholders themselves, power to burden future shareholders with pecuniary obligations; that in his opinion it was not intended to give them as much power as the directors which were to be elected by the shareholders themselves and that their duties were limited to purposes of organization, to opening stockbooks and dealing with subscriptions and upon the necessary amount being subscribed and paid up, to call a general meeting of the shareholders to elect directors whereupon their duties would cease: and that the "working up" of bonuses and incurring large expense in doing so was not within their powers as conferred by the Special Act then under consideration. He says at page 576 "The persons provisionally appointed are mere trustees for the carrying out of a plain simple duty and that in the performance of that duty they are to derive no personal advantage and to create no unnecessary burden on those who subscribe for shares in the undertaking." He concedes that they might appoint a person to act as their secretary and treasurer, but if such person is one of the statutory provisional directors he considers that he would not be entitled to remuneration, nor can they themselves while practically trustees claim payment for their services. In this judgment Gwynne and Galt, JJ., concurred.

Provisional directors must proceed regularly in the manner prescribed by the act and if they meet without proper notice having been given or attempt to transact business while no quorum is present their acts will be invalid: *McLaren v. Fiskien*, 28 Gr. 354. A provisional director has no power to bind the company by agreeing that a subscriber for stock shall only have to pay his subscription upon the company fulfilling certain conditions. No provisional director can bind the company by his representations or agreements: *Wilson v. Ginty*, 3 A.R. 124; but where one provisional director was entrusted by the company with the performance of the various duties necessary for organization and he performed those duties without always consulting his co-directors, everything being carried on informally and frequently irregularly, it was held that a person employed by such provisional director to advertise and otherwise promote the undertaking might recover the value of his services from the company: *Allen v. Ontario and Rainy River R.W. Co.*, 29 O.R. 510. Where provisional directors had executed a

bond on behalf of a railway company to maintain work shops in Whitby in consideration of a bonus granted by the latter it was held by Boyd, C., at the trial that this bond was binding upon the railway and upon a company with which it had amalgamated: *Whitby v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cases 265; but upon appeal this judgment was reversed on the ground that the provisional directors had no statutory power to enter into such an obligation: S.C. 1 Can. Ry. Cases 269.

In *O'Dell v. Boston & Nova Scotia Coal Co.*, 29 N.S.R. 385, it was held that provisional directors might perform the usual duties necessary to the management of the undertaking and accordingly might dismiss employees. Where an act creating a company required that it should not "commence operations" until fifty per cent. of its capital had been paid up it was held that this did not prevent provisional directors from proceeding to allot stock and collect calls or do any other act within their power short of actual operation of the company: *North Sydney, etc., Co. v. Greener*, 31 N.S.R. 41. It will be observed that the above section precisely defines the powers and duties of provisional directors and gives them power to proceed with the necessary preliminary surveys so the above cases must be read in the light of the powers expressly conferred by this statute and by the special act incorporating the railway company.

54. If more than the whole stock has been subscribed, the provisional directors shall allocate and apportion the authorized stock among the subscribers as they deem most advantageous and conducive to the furtherance of the undertaking. 51 V., c. 29, s. 34. Allotment of stock.

Allotment of Stock. For other decisions upon this point see the notes to secs. 56 and 95, *infra*.

But for the express provisions enabling provisional directors to allot stock it may be that they would have no such power. It has been held that an agreement before organization of a company to take stock was not binding because there were then no directors to allot it and they were the only ones who could do so: See *Cazalais v. Picotte*, Q.R., 18 S.C. 538.

Unless specially authorized to do so directors may not issue shares at less than their par value: *McIntyre v. McCracken*, 1 A.

R. 1; 1 S.C.R. 479; nor where shareholders have declared how an allotment shall be made may the directors vary it by providing for an allotment to themselves: *Stephenson v. Vokes*, 27 O.R. 691. In every allotment there must be a notification thereof to the subscriber as the subscription is merely an offer which is not sufficiently accepted by the action of the directors in allotting stock pursuant to it. The contract is not complete until notice of the allotment is given to the purchaser: *Pellatt's Case*, 2 Ch. 527; *Gunn's Case*, 3 Ch. 40; and it will not be sufficient notice of allotment merely to hand the acceptance to the company's brokers to be advertized in the local paper: *Nasmith v. Manning*, 5 A.R., 126 5 S.C.R. 417; nor will notice of allotment sent to the company's own agent bind the subscriber: *Hebb's Case*, 4 Eq. 9; but notice of allotment sent by mail will bind the subscriber from the time of posting it if the letter reached the allottee: *Dunlop v. Higgins*, 1 H.L.C. 381; *Harris' Case*, L.R. 7 Ch. 587; and apparently the contract is complete whether the letter reached him or not unless perhaps he has designated any other method of notifying him: *Harris' Case*, *supra*; *Household Fire v. Grant*, 4 Ex. D. 216, and see *Oppenheimer v. Brackman*, 32 S.C.R. 699; and *Alexander v. Steinhardt* (1903), 2 K.B. 208. Where, however, a person contracts with a company by deed under seal to take certain shares and those shares are allotted to him pursuant to the contract no further notice is necessary: *Nelson v. Pellatt*, 2 O.L.R. 390, 4 O.L.R. 481, following *Xenos v. Wickman*, L.R. 2, H.L. 296, and distinguishing *Nasmith v. Manning*, *supra*. To the same effect as *Nelson v. Pellatt* is *European, etc., R.W. Co. v. McLeod*, 3 Pugs. (N.B.) 3; see pp. 34, 35 and 40. A letter written by the company's secretary to the subscriber stating that certain shares have been allotted to him will not be binding upon him unless it is also shown that such shares were actually allotted by the directors: *Connor v. Matthews*, Q.R. 8, Q.B. 138; where a subscriber makes it a condition that he shall not pay for his shares unless he receives certain other money and he does not receive it and no formal notification of allotment is sent him he is not bound by his subscription: *Re Publishers Syndicate; Mallory's Case*, 3 O.L.R. 552; but a provisional director has no power to bind the company by accepting subscriptions upon a condition and if allotment is made and notice thereof duly given, the subscriber will be liable even

though the condition be unfulfilled: *Nasmith v. Manning*, 29 U.C.C.P. 34, 5 A.R. 126, 5 S.C.R. 417; and every condition annexed to a subscription must be approved by the company before the latter can be bound by it: *Hamilton v. Holmes*, 33 N.S.R. 100; *Kingston St. R. W. Co. v. Foster*, 44 U.C.R. 552. Where a company issued certificates of stock and handed them to their brokers to be forwarded to subscribers but it did not appear whether defendant's certificate ever reached him but notice of calls were subsequently sent him, this was held to be a sufficient notice of allotment: *Denison v. Lesslie*, 43 U.C.R. 22, 3 A.R. 536. Directors cannot delegate to their officers or to third parties the company's statutory powers to allot stock or make calls: *Re Bolt & Iron Co.; Hovenden's Case*, 10 P.R. 434.

Capital.

55. The capital stock of the company, the amount of which shall be stated in the Special Act, shall be divided into shares of one hundred dollars each; and the money so raised shall be applied, in the first place, to the payment of all fees, expenses and disbursements for procuring the passing of the Special Act, and for making the surveys, plans and estimates of the works authorized by the Special Act; and all the remainder of such money shall be applied to the making, equipping, completing and maintaining of the railway, and other purposes of the undertaking. 51 V., c. 29, s. 35.

Capital stock and shares.

Application of proceeds.

Compare 8 Viet., cap. 16 (Imp.), secs. 6 and 65. The English statute being applicable to all kinds of companies does not prescribe the amount of the shares.

Application of Capital. This section gives promoters the right to reimburse themselves out of the capital stock for any expenses of organization for which they may have paid or become liable. When provisional directors or promoters in advance of the organization of a company act on behalf of the incorporators they may be personally liable for expenses properly incurred but will be entitled to contribution from those for whom they act in proportion to the amounts of their subscription for stock: *Sandusky v. Walker*, 27 O.R. 677; *Sylvester v. McCuaig*, 28 U.C.

C.P. 443. Where defendants took over the Grand Junction Railway Co., but without taking any stock in it, it was held that no capital stock in the Grand Junction Railway having been subscribed, there was nothing out of which the expenses of a preliminary survey could be paid and they were not liable merely by reason of their having acquired the other line: *Peterborough v. Grand Trunk R.W. Co.*, 18 U.C.R. 220. A person entering into an obligation on behalf of a company not yet formed will be personally liable: *Thomson v. Feeley*, 41 U.C.R., 229. Where work is performed, however, on behalf of a company afterwards incorporated the person performing the services may recover out of the funds of the company provided the services were such as are covered by the terms of the statute: *Hitchins v. Kilkenny R.W. Co.*, 9 C.B. 536; *Re Tilleard*, 11 W.R. 764; but a person employed as a clerk to the promoter of the company who has looked only to the promoter for payment cannot recover out of the funds of the company for work done in obtaining incorporation: *Re Kent Tramways Co.*, 12 Ch. D. 312. A promoter may, however, stipulate that he shall not be personally liable but that the work shall be paid for only out of the funds of the company when organized: *Parsons v. Spooner*, 5 Hare 102. A person may agree to indemnify a company against the costs of obtaining a Special Act notwithstanding the latter's liability under the above section, but an agreement to indemnify promoters will not relieve the company from liability for expenses of incorporation properly incurred: *Re Brampton, etc., R.W. Co.*, 10 Ch. 177; *Addison's Case*, 20 Eq. 620.

Purposes to which Capital may be Applied. See notes to sec. 54, "Powers of Companies."

Reserve Fund. An ordinary trading company may without special authority set aside a reserve fund out of its earnings: *Earle v. Burland*, 27 A.R. 540, affirmed on this point (1902), A.C. 83.

Preferred Stock. No power is expressly given under the Railway Act to issue preferred stock, nor is it usual in granting charters to insert in the Special Act any provision for doing so. The question whether a company has power even with the consent of a majority of its shareholders to issue preferred stock is one of some difficulty, because the issuance of preferred stock whereby certain shareholders are to be paid dividends before

the rest can receive any upon their stock has been held to be a breach of the rule that all shareholders are entitled to equal rights, unless the contrary is declared by statute, charter or expressed contract: Lindley on Companies, p. 399; *Hutton v. Scarboro Hotel Co.*, 2 Dr. & Sm. 514 and 521; and it is therefore safer where it is desired to issue preferred stock that the by-law providing for the issue of such shares should be unanimously sanctioned by the vote of the shareholders present in person or by proxy at a general meeting of the company duly called for considering the same or that it should be otherwise unanimously sanctioned in writing by the shareholders of the company. White's Canadian Company Law, 87. The case of *Hutton v. Scarboro*, however, was dissented from by Lord Macnaghten in *British v. Couper* (1894), A.C. 399; and in *Andrews v. Gas Meter Co.* (1897), 1 Ch. 361. *Hutton v. Scarboro* was definitely over-ruled, and it was held that the rights of shareholders in respect to their shares and the terms on which additional capital may be raised are matters to be regulated by the company and may be determined by it from time to time by special resolution and the court therefore upheld the validity of the resolution authorizing the creation of preference shares. See also *Allen v. Gold Reefs* (1900), 1 Ch. 656; Buckley on Company Law, 8 Ed., pp. 215 and 216.

56. So soon as twenty-five per cent. of the capital has been subscribed, and ten per cent. of the amount subscribed has been paid into some chartered bank in Canada, the provisional directors shall call a meeting of the shareholders of the company at the place where the head office is situate, at such time as they think proper, giving the notice prescribed by section sixty-one of this Act, at which meeting the shareholders who have paid at least ten per cent. on the amount of stock subscribed for by them shall, from the shareholders possessing the qualifications hereinafter mentioned, elect the number of directors prescribed by the Special Act. 51 V., c. 29, s. 36.

First
meeting
of share-
holders.

Notice
thereof.

Election
of
directors.

No similar provision appears in the English Act. By 8 Viet., cap. 16, sec. 66, the first general meeting of the company is to be held within the time prescribed by the charter or, if no time is

prescribed, then within one month after incorporation. The provisions governing the subscription and payment for stock are generally prescribed by the Special Act. See also section 83 as to the election of directors.

Subscription and Payment for Stock. It is only when the conditions as to subscription and payment of the necessary proportions of stock have been truly and in fact complied with that the persons associated by the charter can proceed with the objects for which they were incorporated, and therefore where a payment on account of the stock was made by note instead of in cash it was held that another subscriber could not be sued for unpaid calls where the necessary amounts to be paid in were not otherwise collected: *Niagara Falls Road Co. v. Benson*, 8 U.C.R. 307; but see *Greener v. North Sydney Transportation Co.*, 31 N.S.R. 41, where it was held that while a company could not "commence operations" unless the necessary amounts had been subscribed and paid for, yet the provisional directors might institute a suit in the name of the company for unpaid calls. It was again held in *Nelson v. Bates*, 12 U.C.R. 586, that payment for shares by discounting the promissory note of the directors was not a payment within the meaning of the statute then under consideration: (12 Vict., cap. 84, U.C.) and that an action for calls brought before the actual payment of the cash by the directors could not be maintained. *Howland v. McNab*, 8 Gr. 47, decided that payment of the proportion on account, required by the charter, by transferring a steamer to the company which formerly belonged to the subscriber was merely an evasion of the statute and that the company could not proceed with its operations. In *Dominion Salvage, etc., Co. v. Atty.-Genl.*, 20 R.L. 557, 21 S.C.R. 72, the provision for payment and subscription of a certain proportion of the capital before the commencement of operations was declared to be imperative and not directory, and being imposed for the benefit of the public it should be strictly insisted upon (see 21 S.C.R., at p. 84), and therefore where only \$60,000 out of \$100,000 of the required capital was *bonâ fide* subscribed and an additional \$40,000 was subscribed by a man of straw and upon a promise made by the directors that he would never have to pay it, it was held that the company was not properly organized and that the Attorney-General of Canada had the right to apply to have the charter set aside. If shareholders

desire, however, that proceedings shall not begin until a certain amount has been paid in and subscribed for, they should provide that their subscriptions are conditional upon that being done and such conditions will then be valid and binding upon the company and on its creditors: *North Staffordshire Steel Co. v. Ward*, L.R. 3 Ex. 172; *Pierce v. Jersey Waterworks Co.*, L.R. 5 Ex. 209.

In an action brought by a creditor against a shareholder who had not fully paid up his subscriptions, it was held that the mere fact that one of the subscriptions had not been paid which was required to make up the amount subscribed and paid for before operations could be begun, or that such subscription was only colourable, was no defence to an action for calls; provided it appeared that the shareholder engaged in the alleged colourable transaction has actually subscribed and paid in his proportion. Any such colourable arrangement would be illegal and not binding on the company: *Port Whitby, etc., R.W. Co. v. Jones*, 31 U.C.R. 170. Generally speaking it is no defence to an action for calls that the amount subscribed was not the full amount of capital required to build the road: *Port Dover, etc., R.W. Co. v. Grey*, 36 U.C.R. 425.

Evidence of Subscription. Even though a shareholder may not have received formal notice of an allotment of stock to him, yet, if he pays a call on account and attends a meeting of shareholders he will be liable, provided he signed the stock book: *Wilson v. Ginty*, 3 A.R. 124. The subscription to a stock book is sufficient evidence of the party subscribing being a shareholder within the meaning of the Railway Act, without the issue to him of any scrip therefor: *Smith v. Spencer*, 12 U.C.C.P. 277, and the mere fact that a railway is called a "railroad" at the head of the stock book does not vitiate the subscription: *Ibid*; and where after a stock book has been opened and signed by a shareholder a new one is opened with a provision that any old subscriber might withdraw upon giving notice thereof to the president, a subscriber to the old stock book who failed to give such notice was bound by his subscription. *Ibid*. Where the number of shares subscribed for by a shareholder has been changed without his authority the shareholder is not liable upon his subscription at all: *Moore v. Gurney*, 22 U.C.R. 209. This case also holds that it is no defence to a shareholder to say that the company has not a sufficient amount subscribed and has no

reasonable hope of collecting it and the company is not bound to wait until it has means in sight to construct all its line before beginning upon a part of it, provided all statutory requirements as to subscriptions have been made. It is a question whether the payment by a shareholder may be made in kind or in "moneys worth" instead of in cash, and in *Howland v. McNab*, 8 Gr. 47, where a steamer had been offered by a subscriber and accepted by the directors in lieu of the cash due on his first payment, it was held that the transaction was merely colourable and was not a sufficient payment within the meaning of the statute. As the section now requires that the money shall be paid into the bank before the operations begin there would appear to be no doubt that a payment in money's worth of the first call or of enough of it to enable the company to begin operations would not be sufficient, but that it must be a payment in cash.

Conditional Subscription for Stock. A railway company has power to agree that a subscription shall be applied in building its main line and not its branches and such a condition is binding upon the company provided it is expressed in the subscription and is not a secret qualification: *Port Dover, etc., R.W. Co. v. Grey*, 36 U.C.R. 425; and a contract between a subscriber and the company that if he would subscribe for shares in the company the latter would give him a contract for the construction of the railway and that he should not be bound by the agreement unless the contract were awarded is a good plea, and if proved would be binding upon the company: *Bullivant v. Manning*, 41 U.C.R. 517. And where in a stock book it was written that the subscription should be conditional upon the railway passing in a certain direction this condition was valid and the mere fact that it was written in a special stock book and not in a general one would make no difference: *Stanstead, etc., R.W. Co. v. Brigham*, 17 L.C.J. 54; *Rodgers v. Laurin*, 13 L.C.J. 175; and where a stock book was headed "stock subscriptions conditional upon the railway passing through the county of Ottawa," this condition was held binding and the subscriber was not liable because the railway did not pass through Ottawa as agreed: *Rodgers v. Laurin*, 13 L.C.J. 175; and see *Connecticut, etc., R.W. Co. v. Comstock*, 1 R.L. 589; but parol evidence is not admissible to prove such a condition where upon its face the subscription is unconditional: *Wilson v. La Société, etc., Co.*, 3 L.N. 79; and an

agreement made with a provisional director that a subscription shall not be binding unless the subscriber receives a contract to build the road does not bind the company and the subscriber will be liable for calls due on the stock notwithstanding it; as a provisional director has no power to bind a company by any such condition: *Port Dover, etc., R.W. Co. v. Grey*, 36 U.C.R. 425; *Wilson v. Ginty*, 3 A.R. 124.

57. The original capital stock of the company may, with the approval of the Governor-in-Council, be increased, from time to time, to any amount, if such increase is sanctioned by a vote, in person or by proxy, of the shareholders who hold at least two-thirds in amount of the subscribed stock of the company, at a meeting expressly called by the directors for that purpose by a notice in writing to each shareholder, delivered to him personally, or properly directed to him and deposited in the post office at least twenty days previously to such meeting, stating the time, place and object of such meeting, and the amount of the proposed increase; and the proceedings of such meeting shall be entered in the minutes of the proceedings of the company, and thereupon the capital stock may, with such approval, be increased to the amount sanctioned by such vote. 51 V., c. 29, s. 37.

Increase
of capital
stock.

Notice
of meet-
ings and
object.

Entry in
minutes.

Compare 26 & 27 Vict., cap. 118, sec. 12 (Imp.), and see sec. 13 of that statute as to the right in England to create and issue new preference shares. No similar provisions appear in the Canadian Act.

Governor-in-Council. This term is defined by R.S.C., cap. 1, sec. 7(8). It means "The Governor-General of Canada, or person administering the government of Canada for the time being, acting by and with the advice of or by and with the advice and consent of, or in conjunction with the King's Privy Council for Canada." This means in substance that an application must be made to the Cabinet administering the Government of Canada for the time being.

Increase in Capital. Where a charter provided that a company might by by-law increase the capital stock so soon as, but not before, the original stock was allotted or paid up, such a company would have no power to increase the capital stock before

the original amount had been paid, and therefore a subscriber to such new stock would not be liable to a creditor of the company under a *scire facias*: *Page v. Austin*, 7 A.R. 1, affirmed 10 S.C.R. 132. It was laid down by the Supreme Court in that case that where a statutory liability is attempted to be imposed on a party which could only apply to an actual legal shareholder in the company he is not estopped by the mere fact of having received transfers of the certificate of stock from questioning the legality of the issue of such stock.

Where a company acting *bona fide* and within its powers decided to increase its capital stock it was held that the courts would not interfere with its action and that the Provincial Secretary, whose duty it was in that case to ratify the action of the directors, had no discretion and was bound to grant such ratification notwithstanding the dissent of a minority of the shareholders: *Re Massey Mfg. Co.*, 11 O.R. 444, 13 A.R. 446; this case would, however, hardly apply to the action of the Governor-in-Council under the present section. Where the Act of Parliament recited that the company had been duly organized, had ceased its operations, and had been re-organized, and declared that the charter was in force and the company as now organized was capable of doing business; held, nevertheless, that this did not give legislative sanction to an illegal increase of capital so as to make holders of shares of such illegally issued stock liable as contributories in winding-up proceedings: *Re Ontario Express, etc., Co.*, 24 O.R. 216; 21 A.R. 646; 24 S.C.R. 716.

Notice of Meeting to Increase Stock. It should be noted that a notice calling a meeting under this section requires to be mailed to each shareholder or delivered to him personally and the provisions of section 61 *infra* for calling other meetings does not apply.

Municipal
corporation may
take
stock.

58. Municipal corporations in any province in Canada duly empowered so to do by the laws of the province, and subject to the limitations and restrictions in such laws prescribed, may subscribe for any number of shares in the capital stock of the company; and the mayor, warden, reeve or other head officer of any such corporation holding stock to the amount of twenty thousand dollars or upwards, shall be *ex officio* one of the direc-

tors of the company in addition to the number of directors authorized by the Special Act, unless in such Special Act provision is made for the representation of such corporation on the directorate thereof. 51 V., c. 29, s. 38, Am. Representation on directorate.

Subscription by Municipalities. As pointed out by Armour, C.J.O., in *Whitby v. Grand Trunk R.W. Co.*, 2 Can. Ry. Cases, at p. 273, municipal corporations have no power at common law to grant bonuses to a railway, and this applies equally to aiding a railway by subscribing for stock. This power could only be granted to them by statute and the provisions of the Acts thus enabling them to subscribe for stock must be *bonâ fide* complied with: *Scott v. Tilsonburg*, 13 A.R. 233; see *Re Campbell and Village of Lanark*, 20 A.R. 372. These powers were first conferred in 1851 by sec. 18, sub-secs. 1 to 3 of 14 & 15 Vict., cap. 51; and the present clause is an amendment of that section. It is to be noted, however, that this clause does not in itself confer power upon municipalities to subscribe for stock, but merely provides that when empowered by the laws of the Province to do so they may subscribe in the manner mentioned in the above section;

In *Higgins v. Whitby*, 20 U.C.R. 296, it was held that where a municipality subscribed pursuant to one of its by-laws passed under 14 & 15 Vict., cap. 51, sec. 18, it had power to require that payment might be made in debentures and not in cash and in an action brought against it by a judgment creditor to recover the amount unpaid on its stock under section 19 of that statute: now sec. 108, *infra*, the municipality was at liberty to plead that it was not required to pay its subscription in cash, but only in debentures. Though such a defence might not be open to an ordinary shareholder it was open to the municipality because under the above statute it could only subscribe upon the conditions specified in its by-law. Where a municipality had agreed to pay for stock by paying contractors as the work progressed and they did so, thus paying the full amount of their indebtedness, it was held that this was a sufficient payment and that they were not liable merely because the money had not gone to the credit of the company as would have to be done in a case of an ordinary shareholder: *Woodruff v. Peterborough*, 22 U.C.R. 274.

Irregularities in Procedure. Where under 14 & 15 Vict., cap. 51, sec. 18, the procedure required for obtaining the assent of

electors had not been minutely followed, but substantial notice had been given and a large amount of money had been borrowed upon the faith of the aid rendered by the municipality, it was held that the details of the notice and assent required by that section were not imperative and a by-law approved by the electors could not be set aside. Under the present law these details would have to be sought for under the Local Municipal Acts as by sec. 58 the subscription must be made subject to the provisions of those statutes. The principle of this case would, however, no doubt apply: *Re Boulton v. Peterborough*, 16 U.C.R. 380. Where it is proposed to submit a by-law for granting aid to a railway company it seems that such by-law should contain proper conditions as to the expenditure of the money as contemplated by the statutes enabling the municipality to grant such aid: *Re North Simcoe R.W. Co. v. Toronto*, 36 U.C.R. 101.

Validity of Conditions Imposed. The following conditions made by municipalities in rendering aid to railroads have been upheld: That a bonus shall only be payable upon the certificate of some competent person: *Bickford v. Chatham*, 10 O.R. 257; 14 A.R. 32; 16 S.C.R. 235. That machine shops shall be located and maintained within the limits of the municipality: *City of Toronto v. Ontario & Quebec R.W. Co.*, 22 O.R. 344. That the company shall remain independent: *Halton v. Grand Trunk R.W. Co.*, 19 A.R. 252; 21 S.C.R. 716. That it shall grant running powers to other companies and procure other companies to erect stations: *Haldimand v. Hamilton, etc., R.W. Co.*, 27 U.C.C.P. 228. That the line should be completed and in running order within a specified time: *Luther v. Wood*, 19 Gr. 349. But the right of the company to the aid granted depends only on the conditions set out in the by-law and bonuses can not be withheld because of the non-performance by the company of the covenants contained in a separate agreement: *Bickford v. Chatham, supra*; nor can such covenants be set out on the face of the debentures issued by the municipality as the latter must be negotiable instruments: *St. Césaire v. McFarlane*, 14 S.C.R. 738.

Meetings of Shareholders.

Annual meetings. 59. A general meeting of the shareholders for the election of directors and for the transaction of other business connected with or incident to the undertaking, to be called "the annual

meeting," shall be held annually on the day mentioned in the Special Act; [or on such other day as the directors may determine] and other general meetings, to be called "special meetings," may be called at any time by the directors or by shareholders representing at least one-fourth in value of the subscribed stock, if the directors, having been requested by such shareholders to convene such special meeting, for twenty-one days thereafter fail to call such meeting. 51 V., c. 29, s. 40, s.-s. 1; amended 4 Edw. VII., cap. 32, sec. 3.

Compare 8 Vict., cap. 16, secs. 66, 67 and 70 (Imp.).

Date of Annual Meeting. Where a by-law making a call on stock was confirmed at the general meeting purporting to be an annual meeting, but not held on the date prescribed by the by-laws of the company, a director who had seconded a resolution of the directorate that the meeting should be held on the wrong day was estopped from objecting to the call on this ground, and so therefore were all who were co-plaintiffs with him: *Christopher v. Noxon*, 4 O.R. 672.

Judicial Control of Meetings. "It is an elementary principle that a court has no jurisdiction to interfere with the internal management of companies acting within their powers:" *Burland v. Earle* (1902), A.C. 83, reversing 27 A.R. 540; and it is no ground for forbidding a special meeting for the purpose of sanctioning the lease of the road to another railway that the accounts of the company have not been previously submitted to shareholders, unless fraud by the majority or corrupt influence has been proved: *Angus v. The Montreal, etc., R.W. Co.*, 23 L.C. Jur. 161. See the same case, 2 L.N. 203, where it is laid down that to enable the court to interfere it must be proved that the minority has been overborne by improper or corrupt influence: citing *Re London and Mercantile Co.*, L.R. 1 Eq. 277; *Heath v. Erie R.W. Co.*, 8 Blatch. 347. Where the interests of shareholders are jeopardized by proceedings at the annual meeting the court pending suit may appoint a receiver or sequestrator to hold the assets of the company in the interests of all concerned during litigation; but where shareholders by agreement with another shareholder possessing a majority of the shares obtained an option to acquire a portion of these shares, but in the mean-

time the vendor was to hold his shares as trustee for the purchasers, reserving his right to vote on them, this did not entitle the purchasers holding the option to an injunction to prevent the holding of the annual meeting even though the vendor has become bankrupt and absconded, and even though by reason of this agreement the meeting would be controlled by others holding a minority of the stock: *Stephen v. Montreal, etc., R.W. Co.*, 7 L.N. 85. But where the acts of a majority of the company are of a fraudulent character or beyond the powers of the company the court will restrain the company from proceeding with the meeting: *Burland v. Earle, supra*, at p. 93; and where shares were issued for the very purpose of keeping directors in power the meeting was restrained: *Fraser v. Whalley*, 2 H. & M. 10; *Punt v. Symons* (1903), 2 Ch. 506. A meeting of shareholders called by the secretary without authority from the directors is illegal: *Re State of Wyoming Syndicate* (1901), 2 Ch. 431.

Ratification of Proceedings. Where a meeting of shareholders is not held at the place required by statute or is irregularly summoned the proceedings will bind all who participated in them without dissent: *Henderson v. Bank of Australia*, 45 Ch. D. 330; *Banque v. Geddes*, M.L.R. 6 S.C. 243, 19 R.L. 684; *Christopher v. Noron*, 4 O.R. 672; and the court will not interfere with the doing of an act by a company which should have been sanctioned by the majority of the shareholders before the act was done, if such sanction can be afterwards obtained: *Purdum v. Ontario, etc., Co.*, 22 O.R. 597; quoting *Macdougall v. Gardiner*, 1 Ch. D. 13, at p. 25.

Conduct at Meetings. Under the English Company's Act, 8 Vict., cap. 16, sec. 80, the declaration of the chairman that the resolution has been carried is sufficient authority for proceeding under it, and it has been held therefore in England that in the absence of fraud a declaration of the chairman that a special resolution has been carried on a show of hands (a poll not having been demanded) is absolutely and not merely *prima facie* conclusive of the fact that the resolution has been carried: *Arnot v. United African Lands* (1901), 1 Ch. 518; but such a declaration is not conclusive where it shows on the face of it that the statutory majority has not voted in favour of the resolution: *Re Caratal* (1902), 2 Ch. 498. A resolution need not be proposed or seconded if it is put to the meeting by the chairman: *Re Hor-*

bury, 11 Ch. D. 109, 117. A majority of shareholders have no right to come to a meeting determined to vote a particular way on any question and to refuse to hear arguments to the contrary, but when the views of the minority have been heard the chairman may, with the sanction of the meeting, declare the discussion closed and put the question to the vote: *Wall v. London* (1898), 2 Ch. 469.

Who May Vote at Meetings. See notes on judicial control of meetings, *supra*. A person may vote upon stock even though he controls the company with it and has a personal interest in the resolution which he is seeking to have passed: *North-West Transportation Co. v. Beatty*, 12 A.C. 589, and although his interest may be opposed to and different from the general or particular interests of the company. S.C., p. 593, and see *Burland v. Earle*, *supra*, at p. 94.

Election of Directors. See notes to sec. 68.

Special Meeting. In England the equivalent term is "extraordinary" meeting: 8 Vict., cap. 16, sec. 68 (Imp.). The secretary cannot call a special meeting without the authority of the directors except upon a valid requisition by shareholders where directors neglected to call it: *Re State of Wyoming* (1901), 2 Ch. 431. Where there is a requisition to call a special meeting to promote certain objects which may be done in a legal way, the court will not restrain the holding of the meeting because the notice calling it is so expressed that consistently with its terms resolutions might be passed which would be *ultra vires* and a notice of a proposal for a special meeting to remove "any of the directors" was sufficiently distinct and the directors were bound to include this object in their notice of the meeting: *Isle of Wight R.W. Co. v. Tahourdin*, 25 Ch. D. 320.

60. All general meetings, whether annual or special, shall be held at the head office of the company. 51 V., c. 29, s. 40, ss. 2. Held at
head
office.

Where owing to the office being locked the annual meeting could not be held at the time appointed and a special general meeting was called for the election of directors the directors appointed at that meeting were under the circumstances duly elected: *Austin Mining Co. v. Gemmell*, 10 O.R. 696.

Notice of
meetings.

61. At least four weeks' public notice of any meeting shall be given by advertisement published in *The Canada Gazette*, and in at least one newspaper published in the place where the head office is situate, in which notice shall be specified the place and the day and the hour of meeting; all such notices shall be published weekly, and a copy of such *Gazette* containing such notice shall, on production thereof, be sufficient evidence of such notice having been given. 51 V., c. 29, s. 41.

Evidence.

Under 8 Viet., cap. 16, sec. 70 (Imp.), fourteen days' notice is required and it has been decided that this means "clear" days: Browne & Theobald, 3rd Ed., 99.

What
business
may be
trans-
acted.

62. Any business connected with or incident to the undertaking may be transacted at an annual meeting, excepting such business as, by this Act of the Special Act, is required to be transacted at a special meeting; but no special meeting shall enter upon any business not set forth in the notice upon which it is convened. 51 V., c. 29, s. 42.

Compare 8 Viet., cap. 16, sees. 66 and 67 (Imp.).

Notice of Purpose of Meeting. The court will endeavour to give effect to a notice of a special meeting if the objects mentioned in that notice can be carried out in a legal way even though they might consistently with their terms involve the sanction of an act which would be *ultra vires*: *Isle of Wight R.W. Co. v. Tahourdin*, 25 Ch. D. 320. Where a notice was sent out stating that a meeting would be held for "special business," but omitting to say what that business was, a resolution adopted at that meeting expelling the plaintiff from the council was held to be void owing to the insufficiency of notice: *Marsh v. Huron College*, 27 Gr. 605. And where a special meeting was called "To receive a report from a committee regarding the conduct of a member," it was held that the association had no right to expel the member at a special meeting so called: *Cannon v. Toronto Corn Exchange*, 27 Gr. 23; 5 A.R. 268. These rules do not apply in all their strictness to public bodies: *Forbes v. Grimsby*, 7 O.L.R. 137. Special notice must be given of an intention to vote remuneration for past services of directors even though the reso-

lution is proposed at a general meeting: *Hutton v. West Cork R.W. Co.*, 23 Ch. D. 654. Where notice of a special meeting was called for the purpose of consenting to a reconstruction scheme and at that meeting resolutions were passed authorizing the winding-up of the company it was held that these resolutions were invalid: *Re Teede & Bishop* (1901), W.N. 52; but a special resolution need not follow the exact terms of the notice given, and where a notice sets out a resolution the former may be amended at that meeting provided the alteration did not materially change its character: *Torbeck v. Westbury* (1902), 2 Ch. 871. See also *Tiessen v. Henderson* (1899), 1 Ch. 861; and *Kaye v. Croydon, Tramways Co.* (1898), 1 Ch. 358, holding that where a notice is misleading, business not disclosed in the notice, but done at the meeting for which that notice was given, will be invalid.

63. The number of votes to which each shareholder shall be entitled, on every occasion when the votes of the shareholders are to be given, shall be in the proportion of the number of shares held by him, and on which all calls due have been paid. 51 V., c. 29, s. 43. Voting.
Calls in
arrear.

Compare 8 Viet., cap. 16, sec. 75 (Imp.).

Voting on Unpaid Shares. Provided a shareholder is not in arrears when the meeting is held his shares need not be fully paid up in order to entitle him to vote: *Purdum v. Ontario, etc., Co.*, 22 O.R. 597; and the mere fact that one shareholder may have paid more on his shares than another does not entitle the former to any greater number of votes: *Ibid.* A person is entitled to vote who has previously been in default in payment of his calls, but has paid the same before the meeting: *Port Dover, etc., R.W. Co. v. Grey*, 36 U.C.R. 425 and 435; but where a shareholder is actually in default at the date of the meeting he will not be entitled to vote: *Christopher v. Noxon*, 4 O.R. 672.

Shares Issued for Purposes of Control. Where shares have been issued for this purpose the persons to whom they have been issued will not be allowed to vote, and if in the majority, they would be restrained from holding the meeting at which the shares were to be used for voting purposes: *Fraser v. Whalley*, 2 H. & M. 10; *Punt v. Symons* (1903), 2 Ch. 507.

Voting on Forfeited Shares. Where shares were forfeited for non-payment of stock and were sold by the company to a purchaser to whom a certificate was issued stating that he was to be deemed the holder of the shares discharged from all calls: Held, he was not entitled to vote while any calls remained due to the company from the original holder: *Randt v. Wainwright* (1901), 1 Ch. 184. Where the holders of the shares for valuable consideration agreed to vote in a particular way, it was held that such agreement was valid and that they might be restrained from voting otherwise than in accordance with their contract: *Greenwell v. Porter* (1902), 1 Ch. 530, but see *James v. Eve*, L.R. 6 H.L. 335.

Voting by proxy. 64. Every shareholder, whether resident in Canada or elsewhere, may vote by proxy, if he sees fit, and if such proxy produces from his constituent an appointment in writing, in the words or to the effect following, that is to say:—

“I, _____ of _____, one of the shareholders of the _____, do hereby appoint _____ of _____, to be my proxy, and in my absence, to vote or give my assent to any business, matter or thing relating to the undertaking of the said _____ that is mentioned or proposed at any meeting of the shareholders of the said company, in such manner as he, the said _____ thinks proper.

“In witness whereof, I have hereunto set my hand and seal the _____ day of _____ in the year _____.” 51 V., c. 29, s. 44.

Compare 8 Viet., cap. 16, secs. 76 and 77 (Imp.).

Validity of vote by proxy. 65. The votes by proxy shall be as valid as if the constituents had voted in person; and every matter or thing proposed or considered at any meeting of the shareholders shall be determined by the majority of votes and proxies then present and given; and all decisions and acts of any such majority shall bind the company and be deemed the decisions and acts of the company. 51 V., c. 29, s. 45.

Majority vote binding.

Compare 8 Vict., cap. 16, sec. 76 (Imp.).

As to the binding nature of acts of the majority see notes to sec. 59, *supra*.

66. Copies of the minutes of proceedings and resolutions of the shareholders of the company, at any annual or special meeting, and of the minutes of proceedings and resolutions of the directors, at their meetings, extracted from the minute book, kept by the secretary of the company, and by him certified to be true copies extracted from such minute books, and when sealed with the company's seal shall, without proof of the signature of such secretary, be evidence of such proceedings and resolutions in any court. 51 V., c. 29, s. 212. Certified copies of minutes, etc.
Evidence.

Compare 8 Vict., cap. 16, sec. 98 (Imp.).

Minutes of Meetings. The minutes need not be signed on the day on which they are entered; it is sufficient if they are signed by the person who is chairman of the meeting, and they may be signed, or signed as confirmed, at a subsequent meeting: Browne & Theobald, 3rd Ed., 115; *Southampton v. Richards*, 1 M. & Gr. 448; *London and Brighton R.W. Co. v. Fairclough*, 2 M. & Gr. 674; *West London R.W. Co. v. Bernard*, 3 Q.B. 873. And where a meeting for a particular purpose is adjourned and the minutes of the adjourned meeting only are signed, the whole of the minutes are admissible in evidence: *Miles v. Bough*, 3 Q.B. 845; *Hughes v. Great Northern R.W. Co.*, 16 Jur. 895.

67. All notices given by the secretary of the company by order of the directors shall be deemed notices by the directors of the company. 51 V., c. 29, s. 213. Notices by secretary valid.

As to notice given by the secretary see notes to secs. 59 and 62, *supra*.

*President and Directors.*Board of
directors.

68. A Board of Directors, which may be known as the directors, of the company, to manage its affairs, the number of whom shall be stated in the Special Act, and a majority of whom shall form a quorum, shall be chosen at the annual meeting; and if

Majority
quorum.

such election is not held on the day appointed therefor, the directors shall cause such election to be held at a special meeting duly called for that purpose within as short a delay as possible after the day so appointed. 51 V., c. 29, s. 46, Am.

The words "which may be known as the directors of the company" in lines one and two are new.

Compare 8 Vict., cap. 16, secs. 81, 82 and 83 (Imp.).

Powers of Provisional Directors. See notes to sections 53 and 54, *ante*.

Election of Directors. See also notes to section 59, *ante*. A shareholder cannot validly agree to waive his statutory right to vote for directors: *James v. Eve*, L.R. 6 H.L. 335; but an agreement to vote for particular directors has been enforced: *Greenwell v. Porter* (1902), 1 Ch. 530. Persons who are only nominally subscribers and are not *bona fide* holders of stock cannot validly vote, but a *bona fide* subscription by one person in his own name, but really as trustee for another enables the subscriber to vote for directors: *Davidson v. Grange*, 4 Gr. 377. Candidates for Board of Directors should not act as scrutineers as there is a conflict between their interest and duty and an election has been set aside on that ground: *Dickson v. McMurray*, 28 Gr. 533. Any election obtained by trick or artifice is not a *bona fide* election and will be set aside, but the mere purchase of shares for the purpose of influencing an election does not invalidate it: *Toronto Brewing & Malting Co. v. Blake*, 2 O.R. 175. See also *Punt v. Symons* (1903), 2 Ch. 506. Where directors could not be elected at an annual meeting as the office was locked and a special meeting was held upon a sufficient requisition of shareholders at a later date at which they elected directors the annual meeting not having been held owing to the fault of the secretary, it was held that the secretary could not subsequently say that the election of directors was invalid: *Austin v. Gemmell*, 10 O.R. 696.

Judicial Interference with Election. In *Davidson v. Grange*, 4 Gr. 377, it was held that a Court of Equity had power to set aside an election of directors on the ground of illegality. Whether proceedings by *quo warranto* are available for testing the validity of an election is open to doubt; such a proceeding lies in the United States: Angell on Corporations, secs. 700-704; but in New Brunswick it has been held to be inapplicable to a private corporation where there is no usurpation of the right or privileges of the Crown: *Ex parte Gilbert re Albert Mining Co.*, 15 N.B.R. 29, citing *Darley v. The Queen*, 12 Cl. & F. 520; and the same rule has been applied in Ontario: *The Queen v. Hespeler*, 11 U.C.R. 222. But in *Re Moore v. Port Bruce*, 14 U.C.R. 366, Robinson, C.J., doubted whether mandamus or *quo warranto* was the proper remedy for setting aside an election of directors of a harbour company because its objects affected a matter in which the public trade and revenue were concerned. See also *The Queen v. Bank of Upper Canada*, 5 U.C.R. 338. In Quebec it has been held that *quo warranto* will lie: *Gilmour v. Hall*, M.L.R. 2, Q.B. 374. The court may, in a clear case, interfere by a mandatory injunction. *Toronto Brewing & Malting Co. v. Blake*, 2 O.R. 175; *White's Company Law*, p. 272; and see *Milott v. Perreault*, 12 Q.L.R. 193. But the court will not set aside an election of directors on the ground of mere irregularity where no harm has been done and there has been no bad faith: *British Asbestos Co. v. Boyd* (1903), 2 Ch. 439.

Duties and Powers. See also note to sec. 80, *infra*. Directors may only act as a board and if they enter into a contract or purport to do other acts in their individual character they may be personally liable, but their contract will not bind the company: *O'Dell v. Boston, etc., Co.*, 29 N.S.R. 385; where an annual meeting was not held owing to an injunction restraining it, which injunction was subsequently dissolved, it was held that upon service of notice of the dissolution of injunction upon the president and secretary, together with a copy of the judgment, the directors were bound to call the meeting, and having failed to do so mandamus would lie to compel them to perform their duty. The calling of the annual meeting is not a duty specially pertaining to the office of president under the Railway Act, but it is the duty of the directors as a body: *Hatton v. Montreal, etc., R.W. Co.*, M.L.R. 1 S.C. 69.

Though directors are for some purposes agents of the company no individual director has an implied power to make promises binding on the company: *Almon v. Law*, 26 N.S.R. 340; and being agents they may not delegate their powers to a company or agent where the exercise of them require discretion and judgment: *Howard's Case*, L.R. 1 Ch. 561; *McDonald v. Rankin*, M.L.R. 7, S.C. 46; and if they employ agents they cannot thereby divest themselves of personal responsibility and are responsible for the fault and misconduct of employees unless the acts complained of could not have been prevented by the exercise of reasonable diligence: *McDonald v. Rankin*, *supra*. But see *Dovey v. Corey* (1901), A.C. 477, where it was held that a director acting *bona fide* was entitled to rely upon the correctness of information furnished him by the company's manager; and where the power given by one person to another is of such a nature as to require its execution by a deputy the person originally authorized may appoint a deputy: *Quebec, etc., R.W. Co. v. Quinn*, 12 Moo. P.C. 233. Directors cannot delegate the power to make calls: *Re Bolt & Iron Co.*, 10 P.R. 434; nor to allot stock or accept transfers or to declare dividends: *White Canadian Company Law*, p. 281; but a managing director had power to contract for the construction of a part of the road and keeping it in repair, at least, where the work has been done and the company by accepting the benefit has impliedly ratified the contract: *Whitehead v. Buffalo, etc., R.W. Co.*, 7 Gr. 351, 8 Gr. 157; see also *Canada Central R.W. Co. v. Murray*, 8 S.C.R. 313; and *Taylor v. Cobourg, etc., R.W. Co.*, 24 U.C.C.P. 200; as to the employment by directors of officers and agents, see notes to sec. 80(b). Directors are not bound to pledge their personal credit in order to raise funds for the company: *Christopher v. Noxon*, 4 O.R. 672.

Liabilities of Directors. Directors may be liable for the acts of agents whom they appoint: *McDonald v. Rankin*, M.L.R. 7, S.C. 46; but generally where a director honestly relies on the judgment, information and advice of the company's officers by which he has been misled he is not to be deemed negligent thereby, and is not liable as for mis-feasance in office: *Dovey v. Corey* (1899), 2 Ch. 629, (1901), A.C. 477. Under the Directors' Liability Act, R.S.O., cap. 216, directors may be liable for misrepresentations contained in any prospectus which they may have signed or of which they otherwise have knowledge: See *McCon-*

nell v. Wright (1903), 1 Ch. 546; *Broome v. Speak* (1903), 1 Ch. 586; (1904), A.C. 348; *Watts v. Bucknell* (1902), 2 Ch. 628; (1903), 1 Ch. 766. But where damages are recovered from one director he is entitled to contribution from any others who might also be liable for the same misrepresentation: *Gerson v. Simpson* (1903), 2 K.B. 197. Where directors refused to obey an order of the court it was held in an action brought in the name of the company that the directors should be removed: *Fraser River Co. v. Gallagher*, 5 B.C.R. 82.

Ratification of Irregularities. Shareholders may ratify acts of the directors which are not themselves *ultra vires* and are merely irregular or informal: White, Canadian Company Law, p. 274; and where a director, contrary to his duty, sold some of his property to the company, it was held that the shareholders might ratify this sale and render it legal, and that the director might employ his own shares in voting for this ratification: *Beatty v. North-West Transportation Co.*, 6 O.R. 300, 11 A.R. 205; *North-West Transportation Co. v. Beatty*, 12 S.C.R. 598, 12 A.C. 589.

Remuneration of Directors. Though the charter of a company provides that no by-law for payment of a director shall be valid until confirmed by the shareholders this applies only to payment for the services *qua* director, and directors may nevertheless be appointed to other salaried offices provided there is nothing in the charter or statute preventing it: *Re Ontario Express Co.*, 25 O.R. 587; commented on *Birnie v. Toronto Milk Co.*, 5 O.L.R. 1. Where large payments were made to a director for "services" without proper explanation of what those "services" were beyond those rendered by him as a director, it was held that he must refund, and that the directors who voted such payments were liable to the company for negligence: *Merchants Fire v. Armstrong* (1901), W.N. 163. Where remuneration was fixed by by-law at a rate per annum and a director before the expiration of the year vacated his office, it was held that the remuneration was not apportionable and the director could not recover for the portion of a year during which he held the office: *Re London and Northern Bank* (1901), 1 Ch. 728. Where directors were, after winding up, appointed receivers and managers, it was held that they were entitled to remuneration in both capacities: *Re South Western, etc., R.W. Co.* (1902), 1 Ch. 701. See also *Caridad v. Swallow* (1902), 2 K.B. 44; *Stroud v. Royal Aquarium* (1903), W.N. 146.

Votes at adjourned meeting. **69.** No person shall vote on such subsequent day, except those who would have been entitled to vote if the election had been held on the day when it should have been held. 51 V., c. 29, s. 47.

Vacancies in directorate. **70.** Vacancies in the directors shall be filled in the manner prescribed by the by-laws. 51 V., c. 29, s. 48.

Qualifications of directors. **71.** No person shall be a director unless he is a shareholder, owning twenty shares of stock and has paid all calls due thereon, and is qualified to vote for directors at the election at which he is chosen. 51 V., c. 29, s. 49.

Disqualification. Where a resolution of the shareholders raised the qualification for a director from 50 to 250 shares at meetings at which the director was present and the secretary, without the director's knowledge, subsequently entered his name on the register for a sufficient number of shares to qualify him and the director by subsequent acts acquiesced in his continuance as a director, it was held that he had not vacated his office upon the passing of the resolution raising the number of qualification shares and that by his acts he had ratified the secretary's conduct in entering his name for the additional number of shares and could not get rid of his liability for calls by subsequently resigning his office: *Molineux v. London, etc., Co.* (1902), 2 K.B. 589. Where a charter required a director to be qualified by holding shares "in his own right" it is not necessary that he should hold them as beneficial owner, but he must hold them in such a way that the company may safely deal with him whatever his interest in the shares may be, and where the holder has become bankrupt and the trustee in bankruptcy claimed the shares, it was held that the holder could no longer be a director: *Sutton v. English, etc., Co.* (1902), 2 Ch. 502.

Term of office. **72.** The directors appointed at the last election, or those appointed in their stead in case of vacancy, shall remain in office until the next ensuing election of directors. 51 V., c. 29, s. 50.

73. In case of the death, absence or resignation of any of the directors, others may, unless otherwise prescribed by the by-laws, be appointed in their stead by the remaining directors; and in case such remaining directors do not constitute a quorum, then by the shareholders at a special meeting to be called for that purpose; but if such appointment is not made, such death, absence or resignation, shall not invalidate the acts of the remaining directors. 51 V., c. 29, s. 51. Vacancies
by death,
etc., how
filled.

74. The directors shall, at their first or at some other meeting after the election, elect one of their number to be the president of the company, who shall always, when present, be the chairman of and preside at all meetings of the directors, unless otherwise provided by by-law, and shall hold his office until he ceases to be a director, or until another president has been elected in his stead; and they may, in like manner, elect a vice-president, who shall act as chairman in the absence of the president. 51 V., c. 29, s. 52, Am.; 61 V., c. 22, s. 3. President
Vice-president.

Salary of President. See also notes to section 68.

The salaries of a president and vice-president of a company duly authorized by resolutions are payable in priority to the claims of general creditors under the provisions of R.S.O., cap. 156, sec. 2; *Fayne v. Langley*, 31 O.R. 254.

Powers of President and Vice-President. A president, as such, has no power to bind the company by making promises on its behalf and express authority must be shown or subsequent ratification on the part of the company: *Almon v. Law*, 26 N.S.R. 340. The calling of an annual meeting is not especially the president's duty, but is the duty of the body of the directors as such: *Hatton v. Montreal, etc., R.W. Co.*, M.L.R. 1, S.C. 69. Where a president entered into a contract for the construction of forty miles of road and subsequently agreed that in default of payment therefor the contractors should take bonds in the company at fifty cents on the dollar, and the road was constructed and the bonds delivered to the contractor, it was held that the action of the president had been ratified and the company could not sub-

sequently repudiate their liability: *Winnipeg, etc., R.W. Co. v. Mann*, 7 Man. L.R. 81. A contract of the president of a railway company engaging the master of a vessel may be binding on the company, though not under seal: *Ellis v. Midland R.W. Co.*, 7 A.R. 464. As to when the president of a company may be liable on a bill of exchange accepted by him: see *Madden v. Cox*, 5 A.R. 473; see also sec. 116, *infra*, and notes. As to the employment of officers: see further notes to sec. 80(b).

Acts of
quorum
are
binding.

75. The directors, at any meeting at which not less than a quorum are present, shall be competent to use and exercise all and any of the powers vested in the directors. 51 V., c. 29, s. 53.

Quorum. Where the quorum of directors was five, and four met at Winnipeg pursuant to a valid notice, and adjourned to Toronto when six met without notice, it was held that the six directors did not constitute a duly organized meeting, as the four who met in Winnipeg had had no power to adjourn the meeting to Toronto, without giving a subsequent valid notice: *McLaren v. Fiskien*, 28 Gr. 352. Where the charter of a company required a quorum of three directors and one of them disposed of his stock and he thereupon ceased to be a director, the directorate became incomplete and incompetent to manage the affairs of the company: *Toronto Brewing & Malting Co. v. Blake*, 2 O.R. 175; see *New Haven v. New Haven*, 30 Ch. D. 350, and *Toronto General Trusts v. Central Ontario R.W. Co.*, 2 Can. Ry. Cas. 274, at p. 282, where the originals of these sections are discussed. Under the resolution that "The continuing directors might act notwithstanding any vacancy in their body," it was held that less than a quorum might validly act: *Re Owen & Ashworth* (1901), 1 Ch. 115.

Acts of
majority
of
quorum
are
binding.

76. The act of a majority of a quorum of the directors present at any meeting regularly held, shall be deemed the act of the directors. 51 V., c. 29, s. 54.

See notes to sec. 75, *supra*.

Votes of
directors.

77. No director shall have more than one vote, except the chairman, who shall, in case of a division of equal numbers, have the casting vote. 51 V., c. 29, s. 55.

78. The directors shall be subject to the examination and control of the shareholders at their annual meetings, and shall be subject to all by-laws of the company, and to the orders and directions from time to time made or given at the annual or special meetings; but such orders and directions shall not be contrary to or inconsistent with any express directions or provisions of this Act or of the Special Act. 51 V., c. 29, s. 56, Am. Directors subject to share-holders and by-laws. Proviso.

The words "or inconsistent with" have been added to the previous section.

Inspection of Books. Where an order was obtained by a shareholder in a foreign corporation doing business in Nova Scotia ordering the company to produce for inspection the register of stockholders and to produce and file an abstract of receipts and expenditures, profits and losses of the company within the Province and a copy of its charter and by-laws and regulations with the list of officers, etc., it was held on appeal that it was not just and convenient to grant such an order upon affidavit, and that while it might be useful in some cases in order to preserve the rights of parties, such a matter should not, as a rule, be disposed of in a summary way: *Merritt v. Copper, etc., Co.*, 34 N.S.R. 416; but in Quebec it has been held that a shareholder is entitled to a mandamus to compel the directors to allow him to inspect the books: *Hibbard v. Barsalou*, 1 L.C. L.J. 98.

79. No person who holds any office, place or employment in, or who is concerned or interested in any contract under or with the company, or is surety for any contractor with the company, shall be capable of being chosen a director, or of holding the office of director, nor shall any person who is a director of the company enter into, or be directly or indirectly, for his own use and benefit, interested in any contract with the company, other than a contract which relates to the purchase of land necessary for the railway, or be or become a partner of or surety for any contractor with the company. 51 V., c. 29, s. 57. Disability of officers, contractors and sureties.

Contracts with Directors. Where by a special act it was provided that the Board of Directors might employ one of their

Board as a paid director, and by resolution under seal the company appointed one of their Board as manager, it was held that notwithstanding the general Railway Act this director might recover arrears of salary: *Reynolds v. Whitby R.W. Co.*, 26 Gr. 519. The mere fact that a director in the company is also a shareholder in another company and partner in a firm having contracts with the company of which he is a director does not render him liable to account for profits made by him out of these contracts: *Costa Rica R.W. Co. v. Forwood* (1900), 1 Ch. 756; (1901), 1 Ch. 746. This case is useful for its general discussion upon the subject. See also *City of London, etc., Co. v. The Mayor, etc., of London*, (1901), 1 Ch. 602; (1903), A.C. 434. The above section is constitutional and where a contract prohibited by it is made, such a contract is void, although the statute itself does not state that it shall be so and only imposes a penalty on the offender; and where the president of a railway company entered into a secret partnership with the contractors for the construction of the road no action can be maintained by him against his partners to enforce such contract: *Macdonald v. Riordan*, Q.R. 8 Q.B. 555, 30 S.C.R. 619.

Directors
may
make
by-laws
respect-
ing:—
Stock,
property
and busi-
ness of
company.

80. The directors may make by-laws or pass resolutions, from time to time for the following purposes:—

(a.) for the management and disposition of the stock, property, business and affairs of the company, not inconsistent with the laws of Canada;

See notes to sec. 69, *ante*.

Appoint-
ment of
officers
and
servants

(b.) for the appointment of all officers, servants and artificers and for prescribing their respective duties and the compensation to be made therefor;

Retire-
ment of
officers
etc.

(c.) for the retirement of such of said officers and servants, on such terms as to an annual allowance or otherwise, as in each case the directors, in the interest of the company's service and under the circumstances, consider just and reasonable. 59 V., c. 9, s. 1.

Interpretation. By R.S.C., cap. 1, sec. 7(4), the word "may" is permissive only and such decisions as *Julius v. Bishop of Oxford*, 5 A.C. 214, holding that this word sometimes imposes a duty would not apply. By sec. 2(b), *ante*, a by-law is to include a resolution so that the words "or pass resolutions" are hardly necessary.

Repeal of By-laws. By R.S.C., cap. 1, sec. 7(45), the power to make by-laws implies a power to repeal them. This power is usually inherent in bodies who have power to pass by-laws and in the absence of some contract forbidding it a person affected by their repeal cannot successfully object on the ground that thereby vested rights are affected: *Wright v. Synod of Huron*, 29 Gr. 348, 9 A.R. 411, 11 S.C.R. 95. In the absence of express authority, directors cannot repeal a by-law lawfully passed by their shareholders: *Stephenson v. Vokes*, 27 O.R. 691; nor can shareholders by repealing a by-law duly enacted by directors prevent an employee from recovering the amount due him for past services performed under the terms of the by-law: *Falkiner v. Grand Junction R.W. Co.*, 4 O.R. 350.

By-laws Operating Unjustly. "It is a general common law principle that a by-law must not be unreasonable or work unequally towards members of any one class affected by it:" Lindley on Companies, 396: *The North-West Electric Co. v. Walsh*, 29 S.C.R. 33, at p. 49, reversing 11 Man. L.R. 629. See also the notes to sec. 243, *infra*.

Appointment of Officers. Compare 8 Vict., cap. 16, sec. 124 (Imp.). Without express statutory power directors may appoint officers such as a solicitor and fix their salaries: *Falkiner v. Grand Junction R.W. Co.*, 4 O.R. 350.

Necessity for Seal. In Manitoba there have been several cases on the subject of appointment of officers. In *Murdoch v. Manitoba, etc., R.W. Co.*, Man. Reports (T.W.) 334, it was decided that the appointment of a chief engineer being a matter of necessity the contract need not be under seal, but where plaintiff was engaged as provisional engineer at \$300 a month, it was held that as the plaintiff was an important official his engagement was not binding on the company, it not being under seal: *Armstrong v. Portage, etc., R.W. Co.*, 1 Man. L.R. 344; but a time keeper is not a superior officer and his employment need not be under seal: *Gordon v. Toronto, etc., Co.*, 2 Man. L.R. 318.

And where a company through its officer makes a contract in general accordance with its powers under the by-laws or otherwise it was binding though not under seal: *Jones v. Henderson*, 3 Man. L.R. 433. Where by resolution defendants appointed plaintiff their permanent land commissioner and the secretary wrote a letter informing him of the appointment and by request affixed the company's seal thereto, it was a question whether this was a sufficient contract under seal to comply with the law in Manitoba and the defendants' by-laws: *Belch v. Manitoba, etc., R. W. Co.*, 4 Man. L.R. 198; and where plaintiff was engaged by the president of defendant company to act as chief engineer at a stated salary and his usual expenses, it was held that the services having been rendered the contract was binding though not under seal, but the term "usual expenses" would not include plaintiff's board while at headquarters, but only his expenses while absent: *Forrest v. Great North-West, etc., R.W. Co.*, 12 Man. L.R. 472. In Ontario a plaintiff sued for services performed in obtaining municipal aid in accordance with provisions of the Railway Act; the only evidence of his appointment was a letter written by one of the provisional directors stating that at a board meeting he had been directed to arrange with the plaintiff to obtain this aid, and it was also shown that the president had recognized and adopted his services and partially paid therefor; it was held that this was not sufficient proof of plaintiff's engagement, nor any ratification by the company of the agreement made by the director; but it was also held that a resolution of the Board of Directors or any entry or minute in their record of proceedings would have been sufficient authority to the director who made the contract without the formality of a by-law or the seal of the company: *Wood v. Ontario & Quebec R.W. Co.*, 24 U.C.C.P. 334. This case was commented on and, under somewhat similar circumstances, was not followed in *Allen v. Ontario, etc., R.W. Co.*, 29 O.R. 510. Where a company appoints its directors to salaried offices without a by-law fixing their salaries as required by the Act of Incorporation and such appointments are afterwards confirmed by legislation they may in the winding up recover upon a *quantum meruit* for services rendered: *Re Ontario Express Co.*, 25 O.R. 587; commented on in *Birnie v. Toronto Milk Co.*, 5 O.L.R. 1, where it was held that a director who was ap-

pointed by provisional directors to be manager at a salary could not recover for his salary as there had been no by-law approved of by the shareholders and no contract under seal.

Dismissal of Officers. Insolence or insubordination on the part of a manager towards directors is a sufficient cause to justify his dismissal by the directors without notice: *Dick v. Canada Jute Co.*, 30 L.C. Jur. 185; and drunkenness is a good ground for dismissal: *Marshall v. Central Ontario R.W. Co.*, 28 O.R. 241. Where the plaintiff had not been hired by a contract under seal, and was dismissed by the directors on account of drunkenness, it was held that the directors had power to so dismiss him, and that the question in all such cases would be whether the plaintiff had so conducted himself that it would have been injurious to the interests of the defendants to have kept him; did he act in a manner incompatible with the full and faithful discharge of his duty, and did he do anything prejudicial or likely to be prejudicial to the interests or reputation of his master?: *McEdwards v. Ogilvie*, 4 Man. L.R. 1.

81. The directors shall, from time to time, appoint such officers as they deem requisite, and shall take sufficient security, by one or more bonds, or by the guarantee of any society or joint stock company incorporated and empowered to grant guarantees, bonds, covenants or policies for the integrity and faithful accounting of persons occupying positions of trust, or for other like purposes, as they deem expedient, from the managers and officers, for the time being, for the safe-keeping and accounting for by them, respectively, of the moneys raised by virtue of this Act and the Special Act, and for the faithful execution of their duties, as the directors think proper. 51 V., c. 29, s. 59.

Appointment of officers and security to be given.

Powers of Officers—Manager. Where a manager orders work to be done which is necessary for the efficient operation of his company, the company will be bound by his acts, but the burden is on the person so contracting with the manager to show his authority to pledge the credit of the company where such power is not within the apparent scope of his authority: *Miller v. Cochran*, 29 N.S.R. 304. See also *White's Canadian Company Law*, pp. 328 to 337.

Managing Director. See also notes to sec. 68, *ante*. The law commits the management of companies to a Board of Directors, and though much routine business may be managed by one or more under the name of Managing Director the company is not bound in matters out of the ordinary course by any other than the regularly constituted authority: *Hamilton, etc., R.W. Co. v. Gore Bank*, 20 Gr. 190, at p. 195; and no person has power merely as director to act as agent of the company and bind it by his own acts alone, and whatever power he may have to bind the company must be derived from his position as manager, which may be proved by written appointment or the fact that he has long and openly acted in that capacity and his services as such have been accepted: *Canada Central, etc., R.W. Co. v. Murray*, 8 S.C.R. 314; and where a company having obtained the benefit of a contract which it would have had the power to make, ratifies such contract when made by its manager it cannot afterwards repudiate it on the ground that the manager had exceeded his powers: *Ibid.* See also *McDougall v. Covert*, 18 U.C.C.P. 119. The position of a managing director who is paid for services given to the company is not that of a servant hired by it, but he is a working member of the company who gets paid for the work he does: *Re Leicester Club*, 30 Ch. D., at p. 633; and therefore the rules as to hiring and notice are not applicable, and his rights are to be ascertained solely by the charter and by-laws of the company: *Re Bolt & Iron Co.*, 14 O.R., at p. 216, 16 A.R. 397, and outside of the provision of the by-laws and charter no remuneration is recoverable: *Ibid.*

Secretary. The secretary of a company, even though authorized by the vice-president, has no power to bind the company to apply certain moneys belonging to the company in payment of executions against it, but he has power to arrange with the creditor that the latter should proceed to attach certain debts due to the company and that the cost of attachment should be paid by the company as between solicitor and client: *Hamilton, etc., R.W. Co. v. Gore Bank, supra*.

Powers
president
of vice-

82. In case of the absence or illness of the president, the vice-president shall have all the rights and powers of the president, and may sign all debentures and other instruments, and perform

all acts which, by the regulations and by-laws of the company, or by the Special Act, are required to be signed, performed and done by the president. 51 V., c. 29, s. 60.

Vice-president. For a discussion of the powers of vice-president: see *Hamilton, etc., R.W. Co. v. Gore Bank*, 20 Gr. 190.

83. The directors may, at any meeting of directors, require the secretary of the company to enter such absence or illness among the proceedings of such meeting; and a certificate thereof, signed by the secretary of the company, shall be delivered to any person requiring the same, on payment to the treasurer of one dollar, and such certificate shall be taken and considered as *prima facie* evidence of such absence or illness, at and during the period, in the said certificate mentioned, in all proceedings in courts of justice or otherwise. 51 V., c. 29, s. 61, Am.

Absence of president may be entered on minutes.

Evidence.

The words "of the company" in the second and fourth lines of this section are new, otherwise the section is the same as in the previous consolidation.

84. The directors shall cause to be kept and, annually, on the thirtieth day of June, to be made up and balanced, a true, exact and particular account of the moneys collected and received by the company or by the directors or managers thereof, or otherwise for the use of the company, and of the charges and expenses attending the erecting, making, supporting, maintaining and carrying on of the undertaking, and of all other receipts and expenditures of the company or the directors. 51 V., c. 29, s. 62.

Annual accounts.

The nature of the returns and accounts required by the Government is specified in secs. 302 to 309, *infra*, and forms therefor appear in schedule 1 to this Act.

Calls.

85. The directors may, from time to time, make such calls of money upon the respective shareholders, in respect of the amount of capital respectively subscribed or owing by them, as they deem necessary; and at least thirty days' notice shall be given of each

Calls upon shareholders.

Notice
of call.

call, and no call shall exceed the amount prescribed in the Special Act, or be made at a less interval than two months from the previous call, nor shall a greater amount be called in, in any one year, than the amount prescribed in the Special Act; but nothing herein contained shall prevent the directors from making more than one call by one resolution of the board: Provided, that the intervals between such calls, the notices of each call, and the other provisions of this Act and of the Special Act, in respect of calls, are duly observed and given. 51 V., c. 29, s. 63.

Compare 8 Vict., cap. 16, sec. 22 (Imp.).

Payment by Instalment. If a statute does not prevent it a company may call up the whole unpaid balance due on stock at once: *Lake Superior Nav. Co. v. Morrison*, 22 U.C.C.P. 217; but calls payable by instalments are valid: *North Western R.W. Co. v. McMichael*, 6 Ex. 273; *Birkenhead, etc., R.W. Co. v. Webster*, 20 L.J. Ex. 234; *Ambergate, etc., R.W. Co. v. Norcliffe*, 6 Ex. 629; nor is it necessary apart from statutes, that calls should be made by the company. The above section, differing in this respect from the English Act, expressly gives directors the right to make calls, but in England where the power is vested in "the company," the same right exists: *Ambergate, etc., R.W. Co. v. Mitchell*, 6 R.C. 235. Where intervals are prescribed for payment of instalments they must be strictly adhered to: *Stratford, etc., Co. v. Stratton*, 2 B. & Ad. 518; and where directors at one meeting made several calls payable at intervals of two months, all but the first call were invalid: *Moore v. McLaren*, 11 U.C.C.P. 534, and where calls exceeded the amount prescribed by statute, they could not be recovered from the shareholder: *Port Dover, etc., R.W. Co. v. Grey*, 36 U.C.R. 425. Calls made on the first of September, November and January, do not comply with the statute, and are bad: *Buffalo, etc., R.W. Co. v. Parke*, 12 U.C.R. 607; the interval required by the act must exclude the first days of the two months: *Re Railways, etc., Co.*, 29 Ch. D. 204; *Cloyes v. Darling*, 16 R.L. 649; *St. John Bridge Co. v. Woodward*, 1 Kerr (N.B.) 29; *Provincial Insurance Co. v. Worts*, 9 A.R. 56; *Bank of Nova Scotia v. Forbes*, 4 Russ. & G. (N.S.) 295.

Incidents of Calls. The illegality of one call does not affect the legality of the others as each call gives a separate right of action: *European, etc., R.W. Co. v. McLeod*, 3 Pugs., 16 N.B.R.

3, 39, 41; *St. John Bridge Co. v. Woodward*, *supra*; *Buffalo, etc., R.W. Co. v. Parke*, *supra*. Unless a shareholder can show fraud or *ultra vires*, he cannot question the propriety of the directors in making calls: *Christopher v. Noxon*, 4 O.R. 672; *Ross v. Fiset*, 8 Q.L.R., at p. 259; but if calls are so made as to impose an unequal burden on the shareholders a Court of Equity would probably interfere: *Christopher v. Noxon*, *supra*; *Walsh v. North-West Electric Co.*, 29 S.C.R. 33; *European, etc., R.W. Co. v. Macleod*, 16 N.B.R. 3. Directors may make calls to prevent transfers of shares until the calls are paid: *Gilbert's Case*, L.R. 5 Ch. 559; or in order to increase the amount of its saleable assets, where a sale of the undertaking is contemplated: *New Zealand v. Peacock* (1894), 1 Q.B. 622; they may not, however, delegate their power to subordinate officers, or one or two of their co-directors: *Re Leeds Banking Co.* L.R. 1 Ch. 561; *European, etc., R.W. Co. v. Dunn*, 16 N.B.R. 321. A shareholder may be estopped from objecting to calls improperly made where by voting for them or otherwise he has acquiesced in the irregularity: *Christopher v. Noxon*, 4 O.R. 672; *Ontario v. Ireland*, 5 U.C.C.P. 139; *Windsor v. Date*, 27 L.C. Jur. 7. Generally calls cannot be made until the company is organized and directors elected: *Halifax v. Moir*, 28 N.S.R. 45. It may be a question whether under section 53, *ante*, provisional directors of a railway company have any such power.

Cesser of Right to Make Calls. The mere fact that a company has ceased to carry on business whereby the shares of defaulters become forfeited does not prevent directors from making calls to pay debts: *Harris v. Dry Dock Co.*, 7 Gr. 450; and directors may be compelled at the instance of shareholders to make such calls. Under the Dominion Winding-up Act, R.S.C., cap. 129, sec. 49, the court may make calls; but this Act does not apply to railways. Sec. 2 (c) and sec. 3 (2) and no similar provision appears in this Act. Under sec. 108, *infra*, a shareholder is liable to execution creditors for the amount unpaid on his stock. A company disorganized and insolvent and without properly elected directors cannot sue a shareholder for a balance due on his shares: *Cie. Cap. Gibraltar v. Lalonde*, M.L.R. 5, S.C. 127; *Massawippi, etc., R.W. Co. v. Walker*, 3 R.L. 450; nor can calls be made to complete part of a railway after the time for doing so has expired: *Dumble v. Peterborough, etc., R.W. Co.*, 12 Gr. 74; assignees or receivers appointed under the Insolvent Act of 1875

can and must make calls if they wish to collect the balance due: *Knight v. Whitefield*, Coutlee's Dig. Sup. Ct. 263; *Ross v. Fiset*, 8 Q.L.R., pp. 258; *Ross v. Guilbault*, 4 L.N. 415.

Publica-
tion of
notice
of call.

86. All notices of calls upon the shareholders of the company shall be published as provided by section sixty-one of this Act, and a copy of the *Gazette* therein mentioned shall, on production thereof, be sufficient evidence of such notice having been given. 51 V., c. 29, s. 64.

Proof of Notice. It is to be noted that while sec. 61, *ante*, requires publication of the notice both in the *Canada Gazette* and in a paper published where the head office is situate, it is only necessary to prove that it was published in the *Gazette*, unless the two sections can be construed to mean that production of the *Gazette* is only evidence of publication in that paper and that publication in the local paper must be proved in the usual way. The section is obscure, it originally appeared as 14 & 15 Vict., cap. 29, sec. 16, sub-sec. 24, but there no notice in a local paper was required and production of the *Gazette* was made *conclusive* evidence of notice. Under this section, production of a *Gazette* of May 28th, containing a notice dated March 15th, was not accepted as evidence of notice given prior to the date of the *Gazette*: *Buffalo, etc., R.W. Co. v. Parke*, 12 U.C.R. 607.

Forms and Requisites of Notice. The notice must specify time and place of payment: *Great North, etc., R.W. Co. v. Biddulph*, 7 M. & W. 243; where notice must be published in every district in which stock may be held; failure to publish in one district is no defence to a shareholder living in another: *Provincial v. Cameron*, 31 U.C.C.P. 523, 9 A.R. 56.

Payment
of calls.

87. Every shareholder shall be liable to pay the amount of the calls so made in respect of the shares held by him, to the persons and at the times and places, from time to time, appointed by the company or the directors. 51 V., c. 29, s. 65.

Compare 8 Vict., cap. 16, sec. 22 (Imp.), last part.

Who are Liable as Shareholders. An equitable mortgagee of shares not standing in his own name is not liable as a shareholder: *Newry, etc., R.W. Co. v. Moss*, 14 Beav. 64; *Hamilton v. Holmes*, 33 N.S.R. 100, at p. 102; nor, *semble*, is a person who takes a transfer of shares absolute in form but really as col-

lateral: *Page v. Austin*, 30 U.C.C.P. 108, 7 A.R. 1, 10 S.C.R. 132; but a person to whom shares have been allotted to enable him to qualify as a director will be liable as a shareholder, even though he never formally accepts them: *Molineux v. London* (1902), 2 K.B. 589; and a director holding qualification shares may be estopped from setting up a transfer of them where it would work to the prejudice of the company: *Kiely v. Smyth*, 27 Gr. 220. If a person takes shares in a fictitious name he will be liable for calls due upon them: *Re Pugh*, L.R., 13 Eq. 566; and so also where they are taken in the name of a person not *sui juris*: *Coventry's Case* (1891), 1 Ch. 202. See *Re Central Bank*, 25 Can. L.J. 238, 16 O.R. 293, 18 A.R. 209. See also notes to sec. 108, *infra*. Where a person other than the beneficial owner has been obliged to pay calls the latter must indemnify him: *Hardoon v. Belilios* (1901), A.C. 118.

88. If, on or before the day appointed for payment of any call, any shareholder does not pay the amount of such call, he shall be liable to pay interest for the same, at the rate of five per centum per annum, from the day appointed for the payment thereof to the time of the actual payment. 51 V., c. 29, s. 66, Am.

Overdue
calls bear
interest.

Compare 8 Vict., cap. 16, sec. 23 (Imp.).

Under the Railway Act of 1888 interest was payable at six per cent. By 63-64 Vict., cap. 29 (D.), the legal rate of interest has been reduced to five per cent., and no doubt the change in this section has been made in order to conform to the present statutory rate. Where a judgment creditor sued a shareholder for the amount unpaid on his stock it has been decided that he may also recover interest upon the amount unpaid. *Nasmith v. Dickey*, 44 U.C.R. 414.

89. If, at the time appointed for the payment of any call, any shareholder fails to pay the amount of the call, he may be sued for the same in any court of competent jurisdiction, and the same shall be recoverable, with lawful interest from the day on which the call became payable. 51 V., c. 29, s. 67.

Failure
to pay
call.

Action
thereon.

Compare 8 Vict. cap. 16 sec. 24 (Imp.).

An agreement to set off the value of the goods supplied to a company against the amount due for calls in apparently *ultra vires*: *Pollatt's Case*, L.R. 2 Ch. 527. The right to sue for calls and the right to forfeit the shares are generally cumulative and the company may pursue both remedies: *Great Northern R.W. Co. v. Kennedy*, 4 Ex. 417; but this is probably not so under the present Act; see sec. 104, *infra*.

Infancy is a defence to an action for calls under this section if the defendant can show that he repudiated his liability upon attaining his majority: *Newry, etc., R.W. Co. v. Coombe*, 3 Ex. 565; *Dublin, etc., R.W. Co. v. Black*, 8 Ex. 181; but not (in England) where there is no repudiation within a reasonable time after coming of age: *Cork, etc., R.W. Co. v. Cazenove*, 10 Q.B. 935; See *Re Central Bank & Hogg*, 19 O.R. 7. As this is a statutory liability the period of limitation is in England twenty years: *Cork, etc., R.W. Co. v. Goode*, 13 C.B. 826, followed *Ross v. Grand Trunk R.W. Co.*, 10 O.R. 447, at p. 454.

Material
allegation
in suits
for calls.

90. In any action or suit to recover any money due upon any call, it shall not be necessary to set forth the special matter, but it shall be sufficient to declare that the defendant is the holder of one share or more, stating the number of shares, and is indebted in the sum of money to which the calls in arrear amount, in respect of one call or more, upon one share or more, stating the number and amount of each of such calls, whereby an action has accrued to the company. 51 V., c. 29, s. 68.

Compare 8 Vict., cap. 16, sec. 26(Imp.).

The words "is the holder" refer to the time at which the call was made: *Belfast, etc., R.W. Co. v. Strange*, 1 Ex. 739; and an action will not lie unless the defendant is shown to be the holder of some specific shares: *Wolverhampton v. Hawkesworth*, 6 C.B.N.S. 336, 7 C.B.N.S. 795, 11 C.B.N.S. 456. Executors of a shareholder upon whom calls were made cannot be sued in the form prescribed by this section: *Birkenhead, etc., R.W. Co. v. Cotesworth*, 6 R.C. 211. For a further discussion of the term "is the holder," see *Hamilton v. Grant*, 33 N.S.R. 77, affirmed 30 S.C.R. 566, where, however, this term is not discussed.

Dividends and Interest.

91. The directors may, with the sanction of the shareholders of the company, at a general meeting, declare a dividend to be paid out of the net profits of the undertaking. 51 V., c. 29, s. 69, Am. Declara-
tion of
dividends.

Compare 8 Vict., cap. 16, sec. 120 (Imp.).

The former Railway Act provided that "at the *annual* meeting" a dividend may be declared. This may now be done at any general meeting, but under section 62, *ante*, notice of an intention to propose a dividend at a special meeting would have to be given.

What are Profits. The question of what is profit available for dividend depends upon the result of the whole accounts fairly taken for the year, capital as well as profit and loss: Byrne, J., *Foster v. New Trinidad* (1901), 1 Ch. 208, at p. 212; and whether there are profits available for distribution as dividends depends upon the circumstances of each case, the nature of the company and the evidence of competent witnesses: *Bond v. Barrow* (1902), 1 Ch. 353; and see page 366 for a discussion of the meaning of the word profits. In the United States "net earnings" are properly the gross receipts, less the expenses of operating the road and interest on debts and many other liabilities are properly payable out of "net earnings." What remains after payment of these sums is the profit of shareholders to go towards dividends: *St. John v. Erie R.W. Co.*, 10 Blatch. (N.Y.) 271; 22 Wall. (U.S. Supreme Court) 136. This definition may, and probably does, apply in Canada as the method of making up the returns of railway earnings show: See Statistical Year Book, 1902, page 354, yet the term must be distinguished from "net profits" appearing in the above section which properly mean the incomings of a concern after deducting the expenses of earning them: *Mersey Docks v. Lucas*, 8 A.C. 891 at p. 903; *Glasier v. Rolls*, 42 Ch. D. 436 at p. 453; see, however, *Corry v. Londonderry, etc., R.W. Co.*, 29 Beav. 263. The question is also discussed in *Verner v. General* (1894), 2 Ch. 239; *Wilmer v. McNamara* (1895), 2 Ch. 245, and *Re National Bank* (1899), 2 Ch. 629. (1901) A.C. 477.

How Payable. The dividend becomes a debt as soon as declared and may be sued for by the holder of shares: *Eastern R.W. Co. v. Symons*, 5 Ex. 237; and the claim becomes barred in

six years: *Re Severn R.W. Co.* (1896), 1 Ch. 559. The holder of the shares at the time of declaration is entitled to the dividend as against his transferor: *Black v. Homersham*, 4 Ex. D. 24, even though the transferor contract of sale may not have been fully carried out: *Ibid.* Unless otherwise authorized, dividends must be paid in cash and cannot be paid by an issue of preference stock: *Hoole v. Great Western R.W. Co.*, L.R. 3 Ch. 262; nor by an issue of debentures: *Wood v. Odessa*, 42 Ch. D. 636.

Rate. 2. Such dividend shall be at and after the rate of so much per share upon the several shares held by the shareholders in the stock of the company. 51 V., c. 29, s. 70, Am.

The words "as such meeting thinks fit to appoint or determine" at the end of the former section 70 have been omitted.

Division of Profits. Where the articles of association provided that dividends should be paid to shareholders in proportion to their shares, it was held in England that upon a true construction of these articles read with the Acts of 1862 and 1867 all shares were entitled to participate equally irrespective of the amounts paid up upon them: *Oak Bank Oil Co. v. Crum*, 9 Ct. of Sess., 4th Series, 198, 8 A.C. 65, and this rule was followed in *Birch v. Cropper*, 39 Ch. D. 1, 14 A.C. 525, and in *Morrow v. Peterborough*, 4 O.L.R. 324, where there was a division of a surplus amongst shareholders in the winding up of the company. For a criticism of this rule see Palmer's Company Law, 4th Ed., p. 176.

Reserve fund. 92. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve fund, to meet contingencies, or for equalizing dividends, or for repairing, maintaining, renewing or extending the railway or any portion thereof, and shall submit their action in regard to such reserve fund to the shareholders at a general meeting for their approval; and the directors may invest the sum so set apart as a reserve fund in such securities as they select, not, however, inconsistent with this or the Special Act.

This clause is new and no similar provision appears in the Canadian Company Act. 2 Edw. VII., cap. 15. In England, by

8 Viet., cap. 16, sec. 122, the directors are authorized to set apart a fund for contingencies before apportioning profits.

It is the right, and probably the duty, of directors where a clause exists similar to the above to consider whether a reserve fund should not be created and added to before making the profits of the company available for dividends: *Fisher v. Black & White Co.* (1901), 1 Ch. 174; and apart from express statutory authority a company is not bound to divide all its profits among its shareholders, but may in the discretion of a majority of its shareholders, legally set apart any portion thereof as a reserve fund, and a court has no jurisdiction to regulate it. The company may even without express power, invest in such securities as it sees fit and the directors who make the investment are not restricted to those which a trustee is authorized to make: *Burland v. Earle* (1902), A.C. 83, reversing in part *Earle v. Burland*, 27 A.R. 540.

93. No dividend shall be declared whereby the capital of the company is in any degree reduced or impaired, or be paid out of such capital, nor shall any dividend be paid, in respect of any share after a day appointed for payment of any call for money in respect thereof, until such call has been paid; but the directors may, in their discretion, until the railway is completed and opened to the public, pay interest at any rate not exceeding five per centum per annum, on all sums actually paid in cash in respect of the shares, from the respective days on which the same have been paid; and such interest shall accrue and be paid at such times and places as the directors appoint for that purpose.

Dividend not to impair capital, etc.
Interest may be paid on calls pending opening of road.

51 V., c. 29, s. 71, Am.

Compare 8 Viet., cap. 16, sec. 121 (Imp.).

This section has been amended by the substitution of "five" for "six" per cent. in conformity with the change in the statutory rate made by 63-64 Viet., cap. 29 (D.), and by substituting the words "actually paid in cash" for the words "called up" in the following line.

Fictitious Dividends. Directors are liable to the company, its shareholders and creditors for all damages resulting from the payment of any dividend which diminishes the capital of the

company; and persons who have bought stock at enhanced prices owing to the declaration of fictitious dividends, may also recover damages from the directors; but a shareholder who might have obtained information showing the true state of affairs will be estopped: *Montreal, etc. v. Geddes*, 19 R.L. 685, at p. 687; *Flintcroft's Case*, 21 Ch. D. 519; *Angus v. Pope*, Q.R. 6, Q.B. 115; and directors may also be criminally liable for conspiracy where they deliberately declared fictitious dividends in order to enhance the value of shares: *Burns v. Pennell*, 2 H.L.C. 525; *Reg. v. Esdaile*, 1 F. & F. 213.

What is Payment Out of Capital. The propositions (1) that dividends must not be paid out of capital; (2) that dividends may only be paid out of profits are not identical, but diverse: *Bond v. Barrow* (1902), 1 Ch. 353, at p. 365; but a company may declare dividends out of profits even though its fixed capital may have become impaired: *Ibid*, and *Lee v. Neuchatel*, 41 Ch. D. 1; *Re National Bank* (1899), 2 Ch. 629, (1901). A.C. 477; *Verner v. General* (1894), 2 Ch. 239; *Wilmer v. McNamara* (1895), 2 Ch. 245, and a company is not bound to replace the amount paid out of capital for interest on debentures before paying dividends: *Bosanquet v. St. John*, 77 L.T. 206; but a company must replace "floating" or "circulating" capital as distinguished from fixed "capital" before paying dividends: *Lee v. Neuchatel*; *Bond v. Barrow*, *supra*.

Payment Out of Accretions to Capital. Generally in determining what are profits, accretions to or diminution of capital must be disregarded: *Mills v. Northern R.W. Co.*, 5 Ch. 621, 631; and a company may set off an increase in the value of some of its assets against its bad debts in determining whether its capital has been impaired: *Bolton v. Natal* (1892), 2 Ch. 124, and any unexpected accretion to capital may be turned into money and divided amongst shareholders: *Lubbock v. British* (1892), 2 Ch. 198; though where a large amount was realized from a supposedly bad debt directors were justified in retaining a large part of it as a reserve, having regard to the general business and assets of the company: *Foster v. New Trinidad* (1901), 1 Ch. 208; and the mere increased value put upon a plant by experts will not justify the declaration of a dividend equal to the amount of the enhancement in value: *Banque v. Geddes*, M.L.R. 6, S.C. 243; though a dividend based upon a reconstruction fund which

was not required as the plant had otherwise been kept in good order might be valid: *Ibid.*

Dividends Out of Capital Ultra Vires. Payment of dividends out of capital is *ultra vires*, for it amounts to a reduction of the capital stock without any statutory authority therefor: *Trevor v. Whitworth*, 12 A.C. 409, and a vote of a general meeting of shareholders cannot justify it: *Flintcroft's Case*, 21 Ch.D. 519. For a general discussion of the rules governing this subject see Palmer's Company Law, 4th Ed., pp. 177-180.

Interest on Amount Called In. Without a by-law a company would not be liable to pay interest before it earned profits. The provision was interpreted as being an inducement to persons to help the undertaking and a person who was not an original subscriber, but to whom shares had been transferred by contractors who received them in payment for work done might perhaps not be within its scope: *McDonell v. Ontario, etc., R.W. Co.*, 11 U.C.R. 267.

94. No interest shall accrue to any shareholder in respect of any share upon which any call is in arrear, or in respect to any other share held by such shareholder while such call remains unpaid. 51 V., c. 29, s. 72. No interest on calls in arrears.

2. The directors may deduct, from any dividend payable to any shareholder, all or any such sum or sums of money as are due from him to the company on account of any call or otherwise. Arrears may be deducted from dividends.

Compare 8 Vict., cap. 16, sec. 123 (Imp.).

Shares.

95. Shares in the company may, by the holders thereof, be sold and transferred by instrument in writing, made in duplicate—one part of which shall be delivered to the directors, to be filed and kept for the use of the company, and an entry whereof shall be made in a book to be kept for that purpose, and no interest or dividend on the shares transferred shall be paid to the purchaser until such duplicate is so delivered, filed and entered. 51 V., c. 29, s. 73. Shares may be transferred.

Compare 8 Vict., cap. 16, sec. 14 (Imp.).

Transfer at Common Law. In *Kiely v. Smyth*, 27 Gr. 220, it was said that there was nothing to prevent the property in shares passing by word of mouth or in any other way that personal estate may be assigned, but this view was attacked in argument in *Hamilton v. Grant*, 33 N.S.R. 77, though not dealt with in the judgments either in the Nova Scotian Court or the Supreme Court in 30 S.C.R. 566, and in England a parol agreement to transfer shares has been specifically enforced; *Duncuft v. Albrecht*, 12 Sim. 189, 199; *Cheale v. Kenward*, 3 DeG. & J. 27; *Humble v. Mitchell*, 11 A. & E. 205, and the transferee will be bound to indemnify the transferor and have himself properly registered: *Wynne v. Price*, 3 DeG. & Sm. 310; *Shaw v. Fisher*, 2 DeG. & Sm. 11, 5 DeG. M. & G. 596; *Sayles v. Blane*, 14 Q.B. 205; *Payne v. Hutchinson*, 3 Ch. 388; *Hawkins v. Maltby*, 4 Ch. 200.

Fraudulent Transfer. When a company issues a certificate to an innocent transferee that he is the owner of certain shares they cannot afterwards refuse to register transfers to persons to whom the holder of the certificate has in good faith sold them: *Balkis v. Tomkinson* (1893), A.C. 396, followed *Dixon v. Kennaway* (1900), 1 Ch. 833, and when a broker *bonâ fide* supposing that he was acting under instructions from a stockholder to sell consols induced the Bank of England to transfer them to his nominee, and it turned out that the stockholder had never authorized a sale and his transfer was forged, it was held that the broker must indemnify the bank upon an implied warranty of authority: *Oliver v. Bank of England* (1901), 1 Ch. 652, (1902), 1 Ch. 610; *Starkey v. Bank of England* (1903), A.C. 114, but where an innocent holder under a fraudulent transfer asks for registration and a certificate which he afterwards sells, it is the company's duty to examine the register, and see that the transfer is proper and, they cannot recover from the person obtaining the certificate unless he has made some representation as to the validity of the transfer: *Sheffield v. Barclay* (1903), 1 K.B. 1, 2 K.B. 580, no title to shares can be founded on a forgery: *Davis v. Bank of England*, 2 Bing. 393, and if a company registers the transferee under a forged transfer, the real owner may have the shares transferred to him: *Midland R.W. Co. v. Taylor*, 8 H.L.C. 751; *Cottam v. Eastern Counties R.W. Co.*, 1 J. & H. 243; *Johnston v. Renton*, 9 Eq. 181, and apparently on learning of the forgery a company

may strike the name of the transferee off the register and replace the name of the true owner: *Hare v. London, etc., R.W. Co.*, 2 J. & H. 480; but the true owner may lose his right to relief if he has been negligent and that negligence has been the means of inducing the person acting on the fraudulent transfer to do so: *Swan v. North British*, 2 H. & C. 175; *Coventry v. Great Eastern R.W. Co.*, 11 Q.B.D. 776; but the negligence must be the proximate cause of the loss and merely executing a transfer in blank (*Taylor v. Great Indian R.W. Co.*, 4 DeG. & J. 559) or omitting to reply to a letter that a transfer would be registered unless notice to the contrary were given (*Barton v. London, etc., R.W. Co.*, 24 Q.B.D. 77) will not constitute an estoppel.

Certificate of Ownership. Upon the registration of a transfer the company usually issues a certificate and thereafter they are estopped from denying the scrip holder's title: *Balkis v. Tomkinson*, and other cases under "fraudulent transfer," *supra*, and in the case of a *bona fide* holder without notice, it is also estopped from denying that the amount certified to be paid has been paid: *Re Bahia and San Francisco, etc., R.W. Co.* L.R. 3 Q.B. 584, and this estoppel operates even against creditors of a company; *McCracken v. McIntyre*, 1 S.C.R. 479; *Ford v. Bloomenthal* (1897), A.C. 156. A certificate is an evidence or muniment of title and is not in itself property which may exist without it: *Re Ottos* (1893), 1 Ch. 618, at p. 628; *Colonial Bank v. Williams*, 15 A.C. at p. 277. The certificate shows the legal and not the equitable title, and persons purchasing without obtaining a legal title by transfer and registration may be ousted by a prior equitable title: *Shropshire, etc., R.W. Co. v. The Queen*, L.R. 7, H.L. 496.

Refusal to Register, Action for Damages. A transferee who has been refused registration may sue for damages and recover the value of the shares at the time of refusal: *Re Ottos, supra*, but directors are first entitled to a reasonable time to examine the validity of the transfer: *Société v. Walker*, 11 A.C. 20, 41, and see further on this White's Canadian Company Law, pp. 192 and 193, and where after refusal shares were subsequently registered, the measure of damages is the depreciation between the date of refusal and subsequent registration: *Grand Trunk R.W. Co. v. Webster*, 6 L.C.J. 178.

Mandamus will also lie to compel a company to make the transfer upon its books: *Reg. v. Lambourn, etc., R.W. Co.*, 22

Q.B.D. 463; *Re Goodwin v. Ottawa, etc., Co.* 13 U.C.C.P. 254, 22 U.C.R. 186; *Re Guillot v. Sandwich*, 26 U.C.R. 246; *Cunningham v. Beaudet*, 11 Q.L.R. 168; *Macdonald v. Montreal, etc., R.W. Co.*, 6 L.C.R. 232; *Brady v. Stewart*, 15 S.C.R. 82; *Upton v. Hutchinson*, 2 Q.P.R. 300, Q.R. 8, Q.B. 505; see also 1 Can. Ry. Cases 294, 295. The writ must be addressed to the company and not to its directors or officers personally: *Cunningham v. Beaudet*, *Upton v. Hutchinson*, *supra*; *Queen v. Clements*, 24 N.B.R. 64.

Equitable Remedies by injunction are also applicable in a proper case: *Smith v. Bank of Nova Scotia*, 8 S.C.R. 558; *McMurrich v. Bond Head*, 9 U.C.R. 333.

Form of
transfers.

96. Transfers, except in the case of fully paid-up shares, shall be in the form following, or to the like effect, varying the names and descriptions of the contracting parties as the case requires, that is to say:—

“I (A.B.), in consideration of the sum of _____ paid to me by (C.D.), hereby sell and transfer to him _____ share (or shares) of the stock of the _____, to hold to him, the said (C.D.), his executors, administrators and assigns (or successors and assigns, *as the case may be*), subject to the same rules and orders and on the same conditions that I held the same immediately before the execution hereof. And I, the said (C.D.), do hereby agree to accept of the said (A.B.) _____ share (or shares) subject to the same rules, orders and conditions.

“Witness our hands this _____ day of _____ in the year 19 ____.”

Compare 8 Vict., cap. 16, sec. 14 (Imp.).

The changes between this and sub-section 2 and the similar sub-sections in the former Act are merely formal.

Form of Transfer. As to whether a transfer may yet be made by word of mouth: See notes to sec. 95, *ante*. The word “shall” being used, apparently the present form is obligatory in the case of shares not fully paid up: R.S.C., cap. 1, sec. 7 (4); where, however, a person had acted as president of a company and could only have done so on the assumption that he had obtained the necessary qualification shares from another, proof of a formal transfer of shares to him was not necessary:

Hamilton v. Grant, 33 N.S.R. 77, 30 S.C.R. 566; see also *Hamilton v. Holmes*, 33 N.S.R. 100, and notes to sec. 108, *infra*. The verbal testimony of the secretary that shares originally in defendant's name have been transferred to another before action is not sufficient to prove the transfer: *Cockburn v. Beaudry*, 2 L.C. Jur. 283. When a transferee is misdescribed, and such misdescription misleads the directors, it may be set aside where directors have the power to refuse to accept a transfer of unpaid shares: *Payne's Case*, 9 Eq. 223; *Allin's Case*, 16 Eq. 449.

Transfers of Unpaid Stock. By section 80 (a) directors may make by-laws "for the management and disposition of the stock" of the company, and therefore no doubt they may pass by-laws providing that all transfers of stock not fully paid shall be subject to their approval; but see notes to section 97, *infra*, and Abbott on Railways, pp. 42 to 46.

2. In the case of fully paid shares the transfer may be in such form as is prescribed by by-law of the company. 51 V., c. 29, s. 74, Am. As to paid-up shares.

An English company may by its articles of association provide that in case of the bankruptcy of a shareholder his shares shall be sold to certain named persons at a specified price, provided such a provision applies equally to all shareholders, and as shares are personal property and the rule against perpetuities does not apply to it; such a provision will be valid no matter when the bankruptcy occurs: *Borland v. Steel* (1901), 1 Ch. 279, but *quære*, whether this case would apply to stock issued under this statute; see notes to section 97, *infra*, Restrictions on transfer.

97. The stock of the company shall be personal property; but no shares shall be transferable until all previous calls thereon have been fully paid up, or until the said shares have been declared forfeited for the non-payment of calls thereon; and no transfer of less than a whole share shall be valid. 51 V., c. 29, s. 75. Stock personal property.
Restrictions on transfers.

Compare 8 Vict., cap. 16, sec. 16 (Imp.).

Definition of Shares. "A share cannot properly be likened to a sum of money settled upon and subject to executory limitations

to arise in the future; it is rather to be regarded as the interest of a shareholder in a company measured for the purpose of liability and dividend by a sum of money, but consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with" the various acts respecting companies which may affect them "and made up of various rights and liabilities contained in the contract including the right to a certain sum of money:" *Borland v. Steel* (1901), 1 Ch. 279, and apart from statute, shares are personal and not real property: *ibid.*

Restrictions on Transfer. In the absence of any restriction by statute or by-law of the company it appears that directors have no implied power to refuse any transfer: *Weston's Case*, 4 Ch. 20; *Gilbert's Case*, 5 Ch. 559; *Chappell's Case*, 6 Ch. 902; *Re Stranton, etc., Co.*, 16 Eq. 559; *Moffatt v. Farquhar*, 7 Ch. D. 591, and unless the transfer has been made on the eve of insolvency the same rule applies in the United States: *Johnson v. Laftin*, 103 U.S. 800, but in that country transfers, unless innocently made, will not be valid if their effect is to defeat creditors in a winding up. Cook on Corporations, 5th Ed., p. 550, but the rule in England is the contrary: *Ibid.*, p. 551 *Re Bahia, etc., R.W. Co.*, L.R. 3, Q.B. 584, but in both England and the United States a transfer to a fictitious person is void: *Ibid.* 552; *Arthur v. Midland R.W. Co.*, 3 K. & J. 204. In New Brunswick it was said that "if it was intended that there should be any restriction on the right to transfer or of ceasing to become a shareholder the Legislature could have imposed it, and they must have known that this could be done and they did not provide for such a case and it would simply be an act of legislation for the court to attempt to do it:" *Re Provincial, etc., Society*, 30 N.B.R. 628, and so a director who made a transfer to a man of straw in order to escape his liability for calls and with the knowledge that the company was insolvent was not liable to contribute, no fraud being shewn: *Ibid.* and the same rule has been adopted in Ontario under the former railway act: *Moore v. McLaren*, 11 U.C.C.P. 534. A shareholder may not, however, surrender his shares to a company in order to escape liability because this is in effect a reduction of capital by the company and that the latter has no power to do unless under circumstances which would justify a forfeiture: *Bellerby v. Rowland* (1901), 2 Ch. 265, (1902), 2 Ch. 14, and therefore the surrenderor may sue to have his name restored to the register even after the lapse of consider-

able time: *Ibid.* The company's secretary cannot object to a transfer by a municipality on the ground that the latter has not complied with the formalities required by the statutes governing the latter's corporate acts: *Vespra v. Beatty*, 17 U.C.R. 540.

98. If any share in the capital stock of the company is transmitted by the death, bankruptcy or last will, donation or testament, or by the intestacy of any shareholder, or by any lawful means other than the transfer hereinbefore mentioned, the person to whom such share is transmitted shall deposit in the office of the company a statement in writing, signed by him, which shall declare the manner of such transmission, together with a duly certified copy of probate of such will, donation or testament, or sufficient extracts therefrom, and such other documents and proofs as are necessary; and without such proof the person to whom the share is so transmitted, as aforesaid, shall not be entitled to receive any part of the profits of the company, or to vote in respect of any such share as the holder thereof. 51 V., c. 29, s. 76.

Trans-
mission
of stock
other
than by
transfer.

Compare 8 Viet., cap. 16, sec. 18 (Imp.).

Evidence of Transmission in case of death is in practice generally furnished by depositing a certified copy of the letters probate or letters of administration and, if required, producing the original for inspection. In Quebec in cases of intestacy evidence of the death of the shareholder, the birth of the heirs and other evidence of heirship, and where there has been a partition, a copy of the deed of partition may be required: *Abbott*, p. 48.

Transfer by Implication. Where the number of qualification shares to be held by a director was increased by by-law and the secretary allotted to the director enough additional shares to qualify him and he subsequently acted as director, but did not formally accept the new shares, he was nevertheless held bound to pay calls upon them: *Molineux v. London, etc., Co.* (1902), 2 K.B. 589, so also where a transfer to a person who subsequently acted as president was sworn to, but no formal transfer or registration was produced, it was held that as he could not have acted as president without these shares, there was sufficient evidence of a transfer to him: *Hamilton v. Grant*, 33 N.S.R. 77, 30 S.C.R.

566. When a stock certificate is deposited by way of equitable mortgage without a transfer or written memorandum the mortgagee does not thereby become the owner, but must apply for an order for transfer and foreclosure: *Harrold v. Plenty* (1901), 2 Ch. 314, and even where there has been a transfer in blank by way of equitable mortgage and an application by him for registration the transferee does not become the legal owner of the stock until registration actually takes place: *Ireland v. Hart* (1902), 1 Ch. 522; a person must have a present absolute right to registration before he can become the legal owner: *Société v. Walker*, 11 A.C. 20; *Moore v. North Western Bank* (1891), 2 Ch. 599; when an assignment is made to a person who does not register and subsequently another assignment is made to a person who has himself entered on the books of the company as owner of the shares the latter takes priority: *Smith v. Walkerville*, 23 A.R. '95.

Transfer by Execution. By 62 Viet. (2), cap. 7, sec. 9, repealing R.S.O., cap. 77, sec. 10, shares are personal property and are exigible under execution and by sec. 11 the sheriff can make the seizure by serving notice of the writ on the company and thereupon any transfer by the execution debtor will be invalid and dividends are payable to the sheriff who may sell the stock. Where seizure could not be made under execution the praetice adopted was to apply by petition for a charging order under 1 & 2 Viet., cap. 110, sec. 14, and 3 & 4 Viet., cap. 82, sec. 1 (Imp.), upon the assumption that those acts were in force in Ontario: *Allan v. Phelps*, 23 Gr. 395; *Caffrey v. Phelps*, 24 Gr. 344, but even where the stock had been fraudulently assigned to prevent seizure the statutes did not apply: *Caffrey v. Phelps*, *supra*.

Transfer in Insolvency. Under former insolvency acts the property in railway stock did not pass unless actually assigned and the assignee registered as owner: *Denison v. Smith*, 43 U.C.R. 503, and see *Brock v. Ruttan*, 1 U.C.C.P. 218.

99. The company shall not be bound to see to the execution of any trust, whether express, implied or constructive, to which any share or security issued by it is subject, and whether or not the company has had notice of the trust; and it may treat the registered holder as the absolute owner of any such share or security, and accordingly, shall not be bound to recognize any

Company
not
bound
to see to
execution
of trusts.

claim on the part of any other person whomsoever, with respect to any such share or security, or the dividend or interest payable thereon: Provided, that nothing herein contained shall prevent a person equitably interested in any such share or security from procuring the intervention of the court to protect his rights. 55-56 V., c. 27, s. 2.

100. The certificate of proprietorship of any share shall be admitted in all courts as *prima facie* evidence of the title of any shareholder, his executors, administrators or assigns, or successors and assigns, as the case may be, to the share therein specified. 51 V., c. 29, s. 78.

Certificate of stock *prima facie* evidence of title.

Compare 8 Viet., cap. 16, sec. 20 (Imp.).

Liability of Trustees or Executors. Where an executor assents to registration of his testator's shares in his own name, he becomes personally liable for calls. If he does not wish to assume such liability, he should have a reasonable time to find a purchaser for them: *Re City of Glasgow Bank*, 4 A.C. 547; *Buchan's Case*, 549, 583, and a resignation by a trustee after a company's insolvency will not relieve him from liability: *Bell's Case*, *Mitchell's Case* and *Rutherford's Case*, *Ibid.* Per Lord Selborne, "Trustees have not in any proper sense of the word a representative character, but executors have. . . . Having representative rights, it is impossible that they should not be entitled to produce the legal evidence of them to the companies for the purpose of having their title in some way recorded and recognized without making themselves personally liable:" *Buchan's Case*, 4 A.C. 549, at p. 596. Where there are two or more trustees they are jointly and severally liable: *Cunninghame v. City of Glasgow Bank*, 4 A.C. 607, and persons holding shares in trust for the company are personally liable to the latter's creditors: *Re Ennis v. West Clare R.W. Co.*, 3 L.R. (Ir.) 187; see also *Barton v. London, etc., R.W. Co.*, 24 Q.B.D. 77; *Barton v. North, etc., R.W. Co.*, 38 Ch. D. 458.

Liability of Company. Apart from statute a company would not be bound to see to the execution of trusts of which it has no notice: *Simpson v. Molsons Bank*, 18 L.N., at p. 170. Under the statute a company need not accept or preserve any notices of

equitable interests in shares, and neither it nor its officers are liable for a breach of trust by the holder of them: Per Lord Selborne, *Société v. Walker*, 11 A.C. 20, at p. 30. But probably where a company has actual knowledge that a transfer is a breach of trust it would be liable, but a strong case must be made out, as where in Quebec shares stood in the name of a tutor to a minor the company must be taken to have known that under Quebec law the tutor had no power to sell: *Bank of Montreal v. Simpson*, 14 Moore P.C. 417; *Colonial Bank v. Williams*, 15 A.C. 267.

Liability of a Purchaser or Transferee. Where shares held "in trust" are assigned to another the assignee is put on enquiry to see that the assignor has power to sell: *Sweeny v. Bank of Montreal*, 12 S.C.R. 661, 12 A.C. 617; *Raphael v. McFarlane*, M.L.R. 5, Q.B. 273, 18 S.C.R. 183.

Sale
without
certificate

101. The want of such certificate shall not prevent the holder of any share from disposing thereof. 51 V., c. 29, s. 79.

See notes to section 95, *ante*.

Forfeiture
of stock
for non-
payment
of calls.

102. Every shareholder who makes default, for the space of two months, in the payment of any call payable by him, together with the interest, if any, accrued thereon, after the time appointed for the payment thereof, shall forfeit to the company his share in the company, and all the profit and benefit thereof. 51 V., c. 29, s. 80, Am.

Instead of the words "makes default" in line 1 of this section the words of the former statute were "neglects or refuses to pay a rateable share of the calls."

Compare 8 Viet., cap. 16, sec. 29 (Imp.).

In general. The right to forfeit is cumulative and may be exercised concurrently with other remedies: *Harris v. Dry Dock Co.*, 7 Gr. 450; *Great Northern R.W. Co. v. Kennedy*, 4 Ex. 417; *Inglis v. Great Northern R.W. Co.*, 16 Jur. 895, and the company is not restricted to its rights to forfeit, but may sue for calls instead: *Marmora v. Jackson*, 9 U.C.R. 509; *Marmora v. Murray*, 1 U.C.C.P. 29; *Marmora v. Boswell*, *ib.* 175.

Forfeiture for Shareholders' Benefit. Forfeiture cannot be employed for the purpose of relieving a shareholder from lia-

bility. It must be exercised by the directors solely with a view to the interests of the Company: *Common v. McArthur*, 8 Q.R.Q.B. 128, 29 S.C.R. 239, and as this power is vested in directors in the company's interests and not in the interests of individual shareholders the latter cannot compel directors to carry out a contract to forfeit his shares: *Harris v. North Devon R.W. Co.*, 20 Beav. 384; *Price v. Denbigh, etc., R.W. Co.*, 38 L.J. Ch. 461.

Relief Against Forfeiture. Where a forfeiture has been properly declared a shareholder is not entitled to set it aside: *Sparks v. Liverpool Waterworks*, 13 Ves. 428; *Naylor v. South Devon R.W. Co.*, 1 DeG. & S. 32. Nor (in Nova Scotia) can such a claim for relief be set up in an action for foreclosure brought by the company: *Canadian, etc., Co. v. Burns*, 34 N.S.R. 303, but mere delay for three years on the part of a deceased shareholder's representatives in bringing action is no defence to an illegal forfeiture: *Glass v. Hope*, 14 Gr. 484, 16 Gr. 420.

103. No advantage shall be taken of the forfeiture unless the shares are declared to be forfeited at a general meeting of the company, assembled at any time after such forfeiture has been incurred. 51 V., c. 29, s. 81. Method
of for-
feiture.

Compare 8 Vict., cap. 16, secs. 30 and 31. (Imp.)

Requirements of the Statute must be strictly complied with and where the notice of a call claims interest from date of notice instead of from date fixed for payment, there can be no forfeiture: *Johnson v. Lyttle*, 5 Ch. D. 687, and where no time was limited by by-law for forfeiting the shares and the statute did not fix the time, the forfeiture was illegal: *Armstrong v. Merchants, etc., Co.*, 37 Can. L.J. 111; and where a declaration of forfeiture by directors has not been confirmed by a general meeting it will be invalid and will be no answer to an action for calls due on the shares: *London, etc., R.W. Co. v. Fairclough*, 3 Scott N.R. 68, 2 M. & G. 674; and the mere fact that a shareholder has not paid his calls and to the knowledge of the company has treated his shares as forfeited will not work a forfeiture: *Ontario, etc., Co. v. Ireland*, 5 U.C.C.P. 135; nor will a mere resolution of the directors declaring a forfeiture operate as a valid forfeiture of shares: *Smith v. Lynn*, 3 E. & A. (Upper Canada) 201; *Fraser v. Robertson*, 13 U.C.C.P. 184.

Effect of
forfeiture
on
liability. 104. Every such forfeiture shall be an indemnification to and for every shareholder so forfeiting, against all actions, suits or prosecutions, whatsoever, commenced or prosecuted for any breach of contract between such shareholder and the other shareholders with regard to carrying on the undertaking. 51 V., c. 29, s. 82, Am.

The words "or other agreements" after "breach of contract" in the fourth line of this section have been omitted. This section has reference to the correlative rights and duties of shareholders *inter se* and can hardly be construed to refer to the rights and liabilities between the company as an independent entity and its shareholders; for as already shown the right to sue for calls and the right to forfeit are cumulative. See *Horris v. Dry Dock Co.*, 7 Grant 450, and notes to section 102, *supra*.

Sale of
forfeited
shares.

105. The directors may sell, either by public auction or private sale, any shares so declared to be forfeited, upon authority therefor having been first given by the shareholders either at the general meeting at which such shares were declared to be forfeited or at any subsequent general meeting; and any shareholder may purchase any forfeited share so sold. 51 V., c. 29, s. 83, Am.

Limita-
tion.

2. The company shall not sell or transfer more of the shares of any such defaulter than will be sufficient, as nearly as can be ascertained at the time of such sale, to pay the arrears then due from such defaulter on account of any calls, together with interest, and the expenses attending such sale and declaration of forfeiture; and if the money produced by the sale of any such forfeited shares is more than sufficient to pay all arrears of calls and interest thereon due at the time of such sale, and the expenses attending the declaration of forfeiture and sale thereof, the surplus shall, on demand, be paid to the defaulter.

Payment
of
arrears
before
sale.

3. If payment of such arrears of calls and interest and expenses is made before any share so forfeited and vested in the company is sold, such share shall revert to the person to whom it belonged before such forfeiture, in such manner as if such calls had been duly paid.

Compare 8 Viet., cap. 16, secs. 32, 34 and 35. (Imp.) This section has been considerably altered. Sub-sections 2 and 3 are new and are substantially the same as the clauses of the English Act cited above. Under the former section 83 the terms on which directors might sell were expressed in somewhat wider language and they were given power to sell unissued shares and to pledge such shares for re-payment of loans to the company. These powers are not now conferred upon it except so far as the power of directors to receive subscriptions and allot stock under sections 53 to 58, *ante*, give the right to deal with any unissued stock.

Notice of Sale. An omission to state in a notice of sale the amounts previously paid on the shares will not affect the validity of the sale: *Gilman v. Royal, etc., Co.*, M.L.R. 1, S.C. 1. It seems that notice of intention to forfeit having been given no further notice that forfeiture has taken place or that a sale will be made need be given: *Re North Hallenbeagle, etc., Co.*, 36 L.J. Ch. 317.

Public Auction or Private Sale. A private sale made in good faith and in the interests of the company will not be disturbed: *Gilman v. Royal, etc., Co.*, *supra*, at p. 11.

Rights of Purchaser. A purchaser of forfeited shares is not liable for calls due before forfeiture; but he cannot vote upon shares while calls due by the original holder remain unpaid: *Randt v. Wainwright* (1901), 1 Ch. 184, see section 63, *ante*. Under the English Companies Act, 1862, Table A., Art. 22, sched. 1, a purchaser of shares forfeited for non-payment of calls takes them free from liability for any call prior to the date of forfeiture; but he is nevertheless liable for any calls that may be thereafter made: *Randt v. New Balkis* (1903), 1 K.B. 461.

106. A certificate of the treasurer of the company that the forfeiture of the shares was declared, shall be sufficient evidence of the fact, and their purchase by the purchaser; and such certificate, with the receipt of the treasurer for the price of such shares, shall constitute a good title to the shares; and the certificate shall be, by the said treasurer, registered in the name and with the place of abode and occupation of the purchaser, and shall be entered in the books to be kept by the company; and such purchaser shall thereupon be deemed the holder of such shares, and shall not be bound to see to the application of the

Certificate of treasurer to be evidence of forfeiture and of title in purchaser

purchase money—and his title to such shares shall not be affected by any irregularity in the proceedings in reference to such sale; and any shareholder may purchase any share so sold. 51 V., c. 29, s. 84, Am.

Compare 8 Vict., cap. 16, sec. 33 (Imp.). For the effect of a certificate granted by a company see notes to section 95, *ante*. The former clause after “books” in line seven from the bottom read “required to be kept by the by-laws of the company.”

107. Any shareholder who is willing to advance the amount of his shares, or any part of the money due upon his shares, beyond the sums actually called for, may pay the same to the company—and upon the principal moneys so paid in advance, or so much thereof as, from time to time, exceeds the amount of the calls then made upon the shares in respect to which such advance is made, the company may pay such interest, at the lawful rate of interest for the time being, as the shareholders, who pay such sum in advance, and the company agree upon; but such interest shall not be paid out of the capital subscribed. 51 V., c. 29, s. 85.

Interest on advance made by shareholder to company.
No interest to be paid out of capital.

The lawful rate of interest is now five per cent., see sections 83 and 93, *ante*, and note; “Interest on amount called in.”

108. Every shareholder shall be individually liable to the creditors of the company for the debts and liabilities of the company, to an amount equal to the amount unpaid on the stock held by him, and until the whole amount of his stock has been paid up, but no such shareholder shall be liable to an action in respect of his said liability until an execution at the suit of the creditor against the company has been returned unsatisfied in whole or in part. 51 V., c. 29, s. 86.

Limit of shareholder's liability to creditors of the company.

Compare 8 Vict., cap. 10, secs. 36 and 37 (Imp.). See also notes to sections 85 and 90, *ante*.

Right to Inspect Register. In England an express right to inspect the register is given for the purpose of finding whether a

person is a shareholder or not; and the right to inspect includes the right to take copies: *Mutter v. Eastern, etc., R.W. Co.*, 4 Times L.R. 377; *Meador v. Isle of Wight Co.*, 9 W.R. 750; *Reg. v. Derbyshire, etc., R.W. Co.*, 3 E. & B. 784; no such right is given under this statute, and as the remedy is a purely statutory one it may be that the creditor will, in Canada, have no right to an inspection.

Issue of Shares at a Discount. By sec. 83 of the Railway Act of 1888, directors might sell unissued stock upon such terms and in such manner as they saw fit, provided the terms were ratified by the shareholders and by section 39 they might allot shares at par in payment for right of way, plant, rolling stock or materials of any kind and in payment for services of contractors and engineers. These provisions are not embodied in the present Act and as there is no statutory authority for issuing stock in payment for services rendered or at less than its full value the question now depends solely upon common law principles. At common law it may now probably be said that the attempt to make partially paid up shares fully paid up is in effect an illegal reduction of the capital stock and is *prima facie* illegal: *McIntyre v. McCracken*, 1 A.R. 1 (reversed, but not on this point, 1 S.C.R. 479); *Re Ontario, etc., Co.*, 24 O.R. 216, 21 A.R. 646, an appeal in which was quashed: see 24 S.C.R. 706, and "there can be no doubt that the original subscribers who had not paid up the whole amount of their stock would be liable to creditors, though as between themselves and the directors, if all had agreed to pay a less sum than was due such agreement might be valid and binding:" Ritchie, C.J., *McCracken v. McIntyre*, 1 S.C.R., at p. 492: see also *Benner v. Currie*, 36 U.C.R. 411; *McGregor v. Currie*, 26 U.C.C.P. 55; *Re Railway, etc., Co.* (1895), 1 Ch. 255; *Ooregum v. Roper* (1892), A.C. 125; *Walsh v. North-West, etc., Co.*, 11 Man. L.R. 629; 29 S.C.R. 33.

As stated above an issue at a discount may be legal as between shareholders where all concur in it: *Bloomenthal v. Ford* (1897), A.C. 156; *Welton v. Saffery*, *ibid.* 299; *Fraser v. Gallagher*, 5 B.C.R., at p. 93, and so also where creditors suffer no injury from the discount: *Re Owen Sound, etc., Co.*, 21 O.R. 349, but this case has been doubted: White's Canadian Company Law, 81. Where a transferee of shares stated to be fully paid up purchases them without notice that they were issued at a discount

the company is estopped from denying that they are fully paid and neither the company nor a creditor can recover the amount unpaid. *McCracken v. McIntyre*, 1 S.C.R. 479, reversing 1 A.R. 1, and affirming the judgment reported 37 U.C.R. 422, and the burden of proving that transferee had notice of the issue at a discount lies upon the person alleging such notice: *Burkinshaw v. Nicolls*, 3 A.C. 1004.

Payment in "Money's Worth." At common law, shares may be fully paid for, not only by money, but by money's worth and where there is no fraud the court will not enquire into the value of the article taken in payment: *Jones v. Miller*, 24 O.R. 268; Lindley on Companies, 5th Ed., 785; Brice on *Ultra Vires*, 3rd Ed., 298, quoted and adopted: *Re Hess*, 23 S.C.R. 644, at p. 654, but where a promoter attempts to sell a property in payment for shares through the medium of directors who are not independent of him, the contract may be rescinded provided the parties may be restored to their original position; *Re Hess*, *supra*. Under Quebec law where shares must be paid for as required by statute in cash, it has been held that where the transaction has been fair and the consideration sufficient anything which in law would support a plea for payment may be treated as a payment in cash: *Larocque v. Beauchemin*, Q.R. 9, S.C. 73, (1897), A.C. 358; adopting *Spargo's Case*, L.R. 8, Ch. 407; see also *Moore v. McKinnon*, 21 U.C.R. 140; *North Sydney, etc., Co. v. Higgins* (1899) A.C. 263, and notes to section 53, *ante*. Where a mortgagee agreed to lend \$100,000 to a company in consideration amongst other things, of getting 68 fully paid shares of the company and a shareholder who held that number of shares on which only 40 per cent. had been paid agreed to transfer them to the mortgagee as 75 fully paid shares on account, if the company would adopt that method of dealing with them, it was held that as the creditors had got the benefit of the money and the transaction was unobjectionable as regards them, neither they nor the company could now allege that there was anything still owing on them: *Necron v. Thorold*, 20 O.R. 86, 18 A.R. 658, 22 S.C.R. 390.

Form of Creditors' Action. Formerly where a judgment creditor of a company sought relief against a person not a party to the record (which is the case where he seeks to recover from a shareholder) the proper remedy was by way of *scire facias*: *Hitchens v. Kilkenny R.W. Co.* 10 C.B. 160; *Gwatkin v. Harri-*

son, 36 U.C.R. 478; *Page v. Austin*, 26 U.C.C.P. 110; but in Ontario Courts the remedy was almost from the beginning by writ of summons; Hagarty, C.J.O. *Brice v. Munro*, 12 A.R. 453, at p. 461, citing *Tyre v. Wilkes*, 13 U.C.R. 482, 18 U.C.R. 46 and 126; *Moore v. Kirkland*, 5 U.C.C.P. 452; *Jenkins v. Wilcock*, 11 U.C.C.P. 505; *Fraser v. Hickman*, 12 U.C.C.P. 584. In Quebec the remedy is by writ of summons: White, p. 220. It is probable that the changes in practice in most Provinces where *scire facias* would formerly have been applicable, have substituted an application for revivor or a summary motion to the court for the older procedure: See *Hamilton v. Stewiacke, etc.*, *R.W. Co.*, 30 N.S.R. 10, at pp. 14 and 15. On an application for *scire facias* it was sufficient to raise a *prima facie* case that a person was a shareholder: *Rastrick v. Derbyshire R.W. Co.*, 9 Ex. 149; *Hamilton v. Stewiacke, etc.*, *R.W. Co.*, 33 Can. L.J. 543; but the mere fact that a person had paid a deposit was not sufficient *prima facie* evidence: *Edwards v. Kilkenny, etc.*, *R.W. Co.*, 14 C.B.N.S. 526. Now, however, the claim is generally made in an action brought direct against a shareholder as appears from *Brice v. Munro* and other cases cited above.

Conditions Precedent to Action. It is not necessary that calls should be made by directors before a creditor can bring his action: *Moore v. Kirkland*, 5 U.C.C.P. 452; *Jenkins v. Wilcock*, 11 U.C.C.P. 505, but he must show that an execution against the company has been returned *nulla bona*: *Moore v. Kirkland, supra*; *Tyre v. Wilkes*, 18 U.C.R. 46; but execution need not be levied in all counties where the railway has had property; one return of *nulla bona* is enough, and if there is property of the company elsewhere which is liable to execution the shareholder must prove it: *Jenkins v. Wilcock, supra*. Where judgment has been obtained against a company whose head office is in another province it is sufficient if execution there has been returned *nulla bona* without issuing execution in the province where judgment is sought against the shareholder: *Brice v. Munro*, 12 A.R. 453, and it is not necessary that the sheriff's return of *nulla bona* should be actually filed at the commencement of proceedings against the shareholder: *Ilfracombe, etc. R.W. Co. v. Devon, etc.*, *R.W. Co.*, L.R. 2, C.P. 15. Where a director had stated there were no funds to pay creditors this was (in England) a waiver of the necessity for execution against the company: *Devereux v. Kilkenny R.W. Co.* 5 Ex. 834. The mere

fact that a sheriff to whom a judgment creditor's writ was directed became a director of the defendant company between the date of delivering the writ to him and the date of its return *nulla bona* does not invalidate proceedings: *Smith v. Spencer*, 12 U.C.C.P. 277.

Nature of Creditor's Remedy—Set Off. In *Woodruff v. Peterborough*, 22 U.C.R. 274, at page 281, Hagarty, J., states (quoting *Ness v. Angus*, 3 Ex., 810 and *Ness v. Armstrong*, 4 Ex. 21) that "a remedy like the present given by express enactment and opposed to the common law must be strictly pursued and no defendant can be made liable except he be brought within the express words of the statute, whatever equity may be created as between him and the company or the stockholders;" and therefore where a municipality had subscribed for stock under C.S.C., cap. 66, sec. 8, and instead of paying the amount of its subscriptions the company had paid it to the contractors as the work progressed, it was held that this was a sufficient payment and the creditor could not recover. In *Smart v. McBeth*, 13 U.C.C.P. 27, at p. 29, Draper, C.J., says "The plaintiff is suing on a cause of action strictly his own; his declaration founded on the statute is a declaration on a specialty: *Cork, etc., R.W. Co. v. Goode*, 13 C.B. 826; and the defendant pleads by way of set off a simple contract cause of action between himself and the company of which he is a stockholder. This is pleaded as a set off, not as a payment of the stock, but as a substitution for such payment; if when this action was brought the stock was unpaid the statutes from that moment give the plaintiff a right to recover, and it seems to me impossible to hold that this right can be defeated by the subsequent election of the defendant . . . to convert a claim upon them into a payment of the stock." Accordingly it was there held that in an action by a creditor the shareholder could not set off a debt due by the railway. In *McBeth v. Smart*, 14 Gr. 298, this view was upheld and the nature of the action is further discussed by Draper, C.J., at p. 310, and the result was that no set off was allowed because (1) as no calls had been made by the company there was nothing due to the company to be set off against the shareholder's claim against it if the shareholder had sued the company, p. 312. (2) The creditor has rights distinct from those of the company and defences which can be set up against the latter cannot be set up against the creditor, p. 315. This case has been more than once

discussed (see *Field v. Galloway*, 5 O.R. 502, at p. 515; *Holmes v. Stewiacke R.W. Co.*, 32 N.S.R. 395, at pp. 403 and 404). In *Rylands v. DeLisle*, L.R. 3, P.C. 17, on appeal from 12 L.C.J. 29, 14 L.C.J. 12, the same rules were adopted; and see also *Maritime Bank v. Troop*, 16 S.C.R., at p. 459. It follows, therefore, that in the matter of equitable set off the creditor is in a better position than the company: *McCracken v. McIntyre*, 1 S.C.R. 544, and it would appear to be doubtful from the previous cases and from *Moore v. McKinnon*, 21 U.C.R. 140, whether any set off against the company can be pleaded. In the last case the shareholder had agreed to convey land to a company, but the agreement had not been carried out nor any deed given; it was held, therefore, that no set off could be allowed as no money was then payable in respect to the land, and *Fraser v. Robertson*, 13 U.C.C.P. 184, is a decision to the same effect.

Where Actions should be Brought. The cause of action arises where the company has its principal office and where judgment is obtained and execution issued, and not where the stockholder subscribed for his shares, if the latter is outside the district of the head office: *Welch v. Baker*, 21 L.C.J. 97; but see also *Brice v. Munro*, 12 A.R. 453, where an action was successfully brought in Ontario against a shareholder of a company whose head office was in another province.

Defences to a Creditor's Action. The following defences have been allowed; payment in good faith by a shareholder to another judgment creditor: *Nasmith v. Dickey*, 42 U.C.R. 350, 44 U.C.R. 414. Payment by a municipality to a contractor: *Woodruff v. Peterborough*, 22 U.C.R. 274, or by debentures instead of in cash: *Higgins v. Whitby*, 20 U.C.R. 296. That subscriptions were conditional upon the performance of some act by the company where such condition was not fulfilled: *Rodgers v. Laurin*, 13 L.C.J. 175, and notes to secs. 53, 54 and 58, *ante*. A compromise made with directors prior to the creditor's action in good faith whereby the shareholder's liability has been released: *Dixon v. Evans*, L.R. 5, H.L. 606. That shares though issued at a discount were acquired by the original holder in good faith as fully paid up: *McCracken v. McKinnon*, 1 S.C.R. 479; *Burkinshaw v. Nicolls*, 3 A.C. 1004. That no notice of allotment had been sent to a subscriber within a reasonable time: *Nasmith v. Manning*, 29 U.C.C.P. 34, 5 A.R. 126, 5 S.C.R. 417 (but see

Nelson v. Pellatt, 4 O.L.R. 481, where this case was explained). That changes in the capital stock or the character of the company have been made after subscription and before allotment and the shareholder has not acquiesced therein or been guilty of laches: *Stevens v. London*, 15 O.R. 75. That new shares were issued and allotted before all shares previously created had been taken up and paid for; and that the new allotment being therefore invalid the new shares were not legally shares at all and the holder could not be liable on them: *Page v. Austin*, 7 A.R. 1, 10 S.C.R. 132. That there has been such a non-compliance with the Act of Incorporation as has in fact prevented the company from legally coming into existence at all: *Quebec, etc., R.W. Co. v. Dawson*, 1 L.C.R. 366. That the judgment previously obtained against the company had been obtained by fraud or that it had not been duly served with notice of action: *Harvey v. Harvey*, 9 A.R. 91. That there had been no sufficient subscription by the shareholder, but a mere entry of shares in his name in the stock book by the secretary: *Ingersoll v. McCarthy*, 16 U.C.R. 162. That the number of shares which the subscriber agreed to take was left blank, but afterwards increased without his authority: *Coté v. Stadacona*, 6 S.C.R. 193. That a sufficient transfer of shares had been made by the subscriber *bona fide* to another person: *Hamilton v. Grant*, 33 N.S.R. 77; 30 S.C.R. 566; *Hamilton v. Holmes*, 33 N.S.R. 100.

The Following Defences Have Been Unsuccessful: That a payment had been made by a shareholder to a previous judgment creditor; where the payment was merely colorable and the payee was in effect a trustee for him: *Nasmith v. Dickey*, 42 U.C.R. 350, 44 U.C.R. 414; that payment had been made to the defendant's railway company in an action brought before the creditor's where the payment was not made in ignorance of the latter's claim: *Tyre v. Wilkes*, 14 U.C.R. 482. That the company's charter has expired for non-performance of conditions or failure to begin operations within the time therein limited: *City of Toronto v. Crookshank*, 4 U.C.R. 309; *Ray v. Blair*, 12 U.C.C.P. 257. That a company has ceased to do business: *Hughes v. Lalonde*, 18 R.L. 205. That there have been irregularities in the nomination or appointment of directors who allotted the stock: *Ryland v. Ostell*, 2 L.C.J. 274; *Ross v. Canadian, &c., Co.*, 5 L.N. 23; *Windsor v. Lewis*, 4 L.N. 331, 26 L.C.J. 29; that subscriptions had been made conditionally upon the performance of a promise

made by an agent of the company having no authority to bind it: *Wilson v. Ginty*, 3 A.R. 124, and see notes to secs. 53, 54 and 58, *ante*. That there were irregularities in the allotment, but it had appeared that the shareholder had nevertheless made a payment on account of calls: *Re Standard Fire; Caston's Case*, 12 S.C.R. 644.. That the directors have not made calls: *Cockburn v. Starnes*, 2 L.C.J. 114; that a surrender of shares had been made by the shareholder to the company: *Ross v. Fiset*, 8 Q.L.R. 251. That certificates for script allotted were merely delivered to the company's broker to be delivered to a shareholder and did not reach the latter where he had by his laches acquiesced in this improper delivery: *Denison v. Leslie*, 43 U.C.R. 22, 3 A.R. 536. That there was a divergence between the prospectus and charter of which the shareholder was ignorant if the company has failed, and the defendant might by due diligence have discovered the difference: *Oakes v. Turquand*, L.R. 2 H.L. 325. That the shares have been forfeited, but the forfeiture was not in accordance with the charter or statute governing the company: *Smith v. Lynn*, 3 Error & Appeal (Upper Canada) 201. That a subscriber was agent for another though he had subscribed in his own name; but in Quebec the agent might be entitled to sue the principal also: *Molsons Bank v. Stoddard*, M.L.R. 6 S.C. 18. That a transfer of the shares had been made after a return of *nulla bona* to an execution against the company: *Nixon v. Green*, 11 Ex. 550; *Nixon v. Brownlow*, 2 H. & N. 455, 3 H. & N. 686; and in Quebec it was held that notwithstanding the transfer by the shareholder of his shares previous to the creditor's action the latter could recover if the debt became due while the shares stood in the defendant's name in the company's books: *Cockburn v. Beaudry*, 2 L.C.J. 283, but this is doubted by Abbott on Railway Law, pp. 42 and 59, and see *Hamilton v. Grant*, 33 N.S.R. 77, 30 S.C.R. 566, a case where shares held by a shareholder had been transferred to another, but if the transfer had been registered in the company's books at all, the register was lost and it was decided that the shares were nevertheless duly transferred as it appeared that the transferee had acted for some time as president of the company, and the only way he could have held the necessary qualification shares was by transfer from the defendant. This was decided upon the provisions of Nova Scotia statutes, but seems to apply to cases under the Dominion Railway Act as well. It would

appear from the head note to the report of that case in the Supreme Court that a mere *bona fide* transfer even without registration, might relieve a shareholder from liability, but an examination of the judgment of Sedgwick, J., shows that it was inferred from surrounding circumstances that the transfer was duly made upon the company's stock list or register and had been lost: See 30 S.C.R. at p. 573. A shareholder can not go behind a judgment obtained by a judgment creditor against the company except to show fraud and collusion or that the subject matter of the recovery was foreign to the affairs of the corporation: *Ray v. Blair*, 12 U.C.C.P. 257; and he cannot show that the contract on which the creditor recovered judgment against the company was usurious and therefore illegal and void: *Frascr v. Hickman*, 12 U.C.C.P. 584. The mere existence of assets belonging to the company against which execution had not been levied, but which were wholly insufficient to satisfy the debt (*Ilfracombe R.W. Co. v. Poltimore*, L.R. 3 C.P. 288) and the suggestion that an Act of Parliament incorporating the company was obtained by fraud of the judgment creditor are not sufficient defence: *Lee v. Bude, &c., R.W. Co.*, L.R. 6, C.P. 576. A shareholder cannot plead in answer to a judgment creditor's action a set-off against the company: See cases under "Nature of Creditor's Remedy—Set-off," *supra*. As to return of execution against the company *nulla bona* see "Conditions precedent to action," *supra*.

Aliens
have
rights as
share-
holders.

109. All shareholders in the company, whether British subjects or aliens, or residents in Canada or elsewhere, shall have equal rights to hold stock in the company, and to vote on the same, and shall be eligible to office in the company. 51 V., c. 29, s. 87.

Record
of share-
holders.

110. A true and perfect account of the names and places of abode of the several shareholders shall be entered in a book, which shall be kept for that purpose, and which shall be open to the inspection of the shareholders. 51 V., c. 29, s. 88.

Compare 8 Vict., cap. 16, sec. 9. (Imp.)

As to creditors' right to inspect register see notes to sec. 108. *ante*, "Inspection of register." The corresponding section in

England has been held to be merely directory so far as the requisites for constituting a shareholder are concerned, though it must be substantially complied with in order to make the register evidence as to who are shareholders: *East Gloucestershire v. Bartholomew*, L.R. 3 Ex. 15. In England and apparently under the Canadian Railway Act as well it is immaterial that the register does not contain the number of the shares: *East Gloucestershire R.W. Co. v. Bartholomew*. The court has jurisdiction in a proper case to rectify the register: *Ashworth v. Bristol R.W. Co.*, 15 L.T.N.S. 561. In *Queen v. Clements*, 24 N.S.R. 64, a motion for a mandamus to inspect the books of the company was served upon the president and secretary of a company, not on the company itself; this was held to be improper and leave to amend the notice was given. *Quære*: Whether mandamus is a proper method of obtaining an inspection? In *Merritt v. Copper, etc., Co.*, 34 N.S.R. 416, a summary order for a mandamus enabling a shareholder to inspect the register of stockholders was set aside on the ground that it was not convenient to grant such an order in a summary proceeding.

Bonds, Mortgages, and Borrowing Powers.

111. The directors of the company, under the authority of the shareholders, to them given at any special meeting, called for the purpose in the manner provided by section 61 of this Act, or at any annual meeting for which like notice of intention to apply for such authority has been given as is required in the case of a special meeting, and at which meeting, whether annual or special, shareholders representing at least two-thirds in value of the subscribed stock of the company, and who have paid all calls due thereon, are present in person or represented by proxy, may, subject to the provisions in this Act and the Special Act contained, issue bonds, debentures, perpetual or terminal debenture stock, or other securities, signed by the president or other presiding officer and counter-signed by the secretary, which counter-signature and the signature to the coupons attached to the same may be engraved; and such securities may be made payable at such times and in such manner, and at such place or

Issue of bonds authorized.
Procedure
When and where payable.

Interest, places in Canada or elsewhere, and may bear such rate of interest, not exceeding five per cent. per annum, as the directors think proper.

Compare 8 Vict., cap. 16, sec. 38 (Imp.).

Differences from Former Act. Under sec. 93 of sub-sec. 1 of the Railway Act of 1888, a railway company could only borrow after the shareholders had authorized the loan at a special general meeting; but by the present section authority may be obtained at an annual meeting as well if due notice is given and two-thirds in value of the shares are represented. As to the nature of the notice required see secs. 61 and 62, *ante*. The words "perpetual or terminal stock" are new. The expression "terminal" is used in contradistinction to "perpetual" and no doubt should be "terminable."

In the former act the rate of interest was limited to six per cent., but by the amendment this has been reduced to five, which is now in all cases the rate of interest; compare secs. 88 and 93, *ante*, and notes.

Where throughout secs. 111 to 116, inclusive, the words "security" or "securities" are used the phraseology was formerly "bonds, debentures, or other securities," but the other words have been dropped and the word "security" is the only one now used.

Power to Create Debts. Unless it flows as a matter of necessary inference from the objects for which a company is incorporated that it must borrow money, it has no power to do so without express statutory authority: *Ashbury v. Riche*, L.R. 9, Ex. 224, 249; 7 H.L. 653, with which compare *Colman v. Eastern Counties R.W. Co.*, 10 Beav. 1; *Brimelow v. Murray*, 9 A.C. 519; *Cunliffe v. Blackburn*, 9 A.C. 857; *Chambers v. Manchester, &c., R.W. Co.*, 5 B. & S. 588. But it might, perhaps, create a charge upon its lands for the purposes of its undertaking; but where Parliament has prescribed the manner and extent of its borrowing powers it cannot borrow in any other way, and where it attempts to do so its securities will be void: *Baroness Wenlock v. River Dee Company*, 10 A.C. 354. It has been held in Canada, however, that a railway company has a general power to create a lien upon its property in favor of persons doing work for it which is in furtherance of the purposes for which it was in-

incorporated: *Bickford v. Grand Junction R.W. Co.*, 23 Gr. 302, 1 S.C.R. 696; *Charlebois v. Great North-West Central R.W. Co.*, 9 Man. L.R. 1. A company may also validly sell its rolling stock and at the same time agree with the purchaser to retain possession of it and to re-purchase it by re-paying the amount of the purchase money with interest within a limited number of years, and this cannot be impeached on the ground that it is a loan: *Yorkshire, &c., Co. v. McClure*, 21 Ch. D. 309; and see *North Central, &c., Co. v. Manchester, &c., R.W. Co.*, 35 Ch. D. 191, 13 A.C. 554. And a company has a general power to incur debts in the ordinary course of its business and it may, if there are valid debts, acknowledge this indebtedness; and in England, where such a practice is in vogue, issue Lloyds' bonds to secure the amount: *White v. Carmarthen R.W. Co.*, 1 H. & M. 786; *Fountaine v. Carmarthen R.W. Co.*, 5 Eq. 316, 325. And it may also give a specific charge on money due it as security for a valid debt: *Pickering v. Ilfracombe R.W. Co.*, L.R. 3, C.P. 235; *Gardner v. London, &c., R.W. Co.*, 2 Ch. 201; and it may assign its rolling stock by way of security: *Blackmore v. Yates*, L.R. 2 Ex. 225. A person who lends money to a company for the purpose of paying its debts, whether due or subsequently incurred, has a valid claim against it to the extent to which his loan has been so applied: Browne & Theobald, 3rd Ed., p. 86; *Re Cork, &c., R.W. Co.*, 4 Ch. 748; *Ulster R.W. Co. v. Banbridge, &c., R.W. Co.*, Ir. R. 2 Eq. 190; *Blackburn v. Cunliffe*, 22 Ch.D. 61, 9 A.C. 857; but the burden of showing that the money so lent has been applied in payment of debts lies on the claimant: *Blackburn v. Cunliffe, supra*. And the lands of a company may remain liable by way of vendors' lien for the amount of unpaid purchase money due in respect of them: *Peto v. Welland R.W. Co.*, 9 Gr. 455; *Patterson v. Buffalo, &c., R.W. Co.*, 17 Gr. 521; *Lincoln v. St. Catharines, &c., R.W. Co.*, 19 O.R. 106; and the same rule exists in England; *Walker v. Ware, &c., R.W. Co.*, L.R. 1 Eq. 195; *Bishop of Winchester v. Mid-Hants R.W. Co.*, L.R. 5 Eq. 17; *Pell v. North Hampton, &c., R.W. Co.*, L.R. 2 Ch. 100; and in *Quebec, Clearihue v. St. Lawrence, &c., R.W. Co.*, Q.R. 9, S.C. 399; and the same lien will exist in favour of the vendor of personal property where it is expressly provided for: *Bickford v. Grand Junction R.W. Co.*, 23 Gr. 302, 1 S.C.R. 696;

Charlebois v. Great North-West Central R.W. Co., 9 Man. L.R. 1; but it may be lost (at least as to personal property) by a subsequent valid mortgage made by the company: *Wallbridge v. Farwell*, 18 S.C.R. 1, at p. 18; and so according to the last case a vendor of rolling stock may lose his lien where he sells to a company which has already mortgaged its immovables because rolling stock becomes an immovable upon being put into operation by a railway company. See also *Barker v. Central Vermont R.W. Co.*, Q.R. 14 S.C. 467; affirmed on review November 3rd, 1899.

Executions as a Charge on the Railway. A sale of the railway as a going concern could not be made under execution because it would break up the undertaking, and this was not contemplated by the statute; and, therefore, an execution would not operate as a charge on the whole railway, and a creditor's only remedy was for the appointment of a receiver: *Galt v. Erie, &c.*; *R.W. Co.*, 14 Gr. 499, 15 Gr. 637; *Toronto General Trusts v. Central Ontario R.W. Co.*, 2 Can. Ry. Cas. 274, and see *Phelps v. St. Catharines, &c.*, *R.W. Co.*, 9 O.R. 501. But a judgment creditor might seize whatever property would not interfere with the railway as an undertaking and which was not specifically mortgaged; and before bondholders took over a railway mortgaged to them such judgment creditor was allowed to attach moneys belonging to the company: *Phelps v. St. Catharines, &c.*, *R.W. Co.*, *supra*, reversing 18 O.R. 581. It was afterwards enacted, however, by 46 Vict., cap. 24 (D.), now incorporated as sec. 240, *infra*, that a railway might be sold as a going concern to an individual and the courts began to construe this as meaning that the old rule that the whole undertaking could not be sold under execution or a charge upon the undertaking created in favor of an execution creditor was changed and they decided that an execution might thereupon create a valid charge and the execution creditor might validly proceed to a sale: *Redfield v. Wickham*, 13 A.C. 467. This was decided upon appeal from Quebec and apparently it was always the law there that a railway might be seized under execution and sold: *Morrison v. Grand Trunk R.W. Co.*, 5 L.C.J. 313; *Drummond v. South Eastern R.W. Co.*, 22 L.C.J. 25; 24 L.C.J. 276; *Hochelaga Bank v. Montreal, &c.*, *R.W. Co.*, 4 L.N. 333; *Ontario Car Co. v. Quebec Central R.W. Co.*, 10 L.N. 12; Abbott on Railways 102; and a seizure under execution has been allowed

though a railway was subsidized by the Government: *Wason v. Levis, &c., R.W. Co.*, 7 Q.L.R. 330. But the railway would have to be sold as a whole: *Stephen v. Banque d'Hochelaga*, M.L.R. 2 Q.B. 491; or such a part of it as would in itself form an integer: *Redfield v. Wickham, supra*; and see *Gray v. Manitoba, &c., R.W. Co.*, 11 M.L.R. 42; (1897) A.C. 254; the result of this amendment in the law, taken with the decision of the Privy Council in *Redfield v. Wickham* leads to the conclusion that the execution would now operate as a charge upon a railway in all provinces and that a railway might be sold under it, subject, of course, to prior existing encumbrances. See *Toronto General Trusts v. Central Ontario R.W. Co., supra*, and 3 Can. Ry. Cas. 339.

Lien Created by Judgment. Where a company having no power to grant a lien to secure money which it has agreed to pay, consents to a judgment creating such a lien but the question of *ultra vires* was not argued or discussed, the lien created by such a judgment is invalid: *Great North-West Central R.W. Co. v. Charlebois* (1899), A.C. 114. But it seems to follow from this judgment that if the question of *ultra vires* had been fairly raised and decided in favour of the lien it would be valid: *Ibid.* See also S.C. 26 S.C.R. 221, *Re South America and Mexican Co.* (1895), 1 Ch. 37; *Nashville R.W. Co. v. United States*, 113 U.S.R. 261; *United States v. Parker*, 120 U.S.R. 89.

Compliance with Statutory Regulations. The provision requiring the consent of a general meeting of the shareholders is directory only and does not invalidate securities issued without such authority, even in the hands of the original allottee of the bonds if he has no notice of any such irregularity: *Fountaine v. Carmarthen R.W. Co.*, L.R. 5 Eq. 316. In that case Sir W. Page Wood, V.-C., afterwards Lord Hatherley, at p. 322, says: "In the case of a registered joint stock company all the world of course have notice of the general Act of Parliament and of a special deed which has been registered pursuant to the provisions of the Act, and if there be anything to be done which can only be done by the directors under certain limited powers, the person who deals with the directors must see that those limited powers are not being exceeded. If, on the other hand, as in the case of *Royal British Bank v. Turquand*, 5 E. & B. 248, 6 *ibid.*, 327, the directors have power and authority to bind the company but certain preliminaries are required to be gone through on the

part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed. He is entitled to presume that the directors are acting lawfully in what they do." This is a general statement of the law which has been frequently referred to: See also *Land Owners, &c., Co. v. Ashford*, 16 Ch.D. 411; *Re Romford Canal*, 24 Ch.D. 85; *Mahoney v. Holyford*, L.R. 6, H.L. 869. A similar rule has been laid down in *Sheppard v. Bonanza, &c., Co.*, 25 O.R. 305, from which case the following remarks of Ferguson, J., at p. 310, are extracted: "Then where a party dealing with the company ascertains the existence on the part of the company [of power] to do the act that is to make and give him the obligation he may go on with the dealing without inquiring as to any formalities that may have been prescribed as preliminaries; he may presume, without enquiry, that these have been properly attended to;" and so where a statute required all evidences of debt issued by a company to be signed by the president and treasurer, this should be looked upon as directory merely and the signature of the secretary, instead of the treasurer, would be sufficient: *City Bank v. Cheney*, 15 U.C.R. 400; and see *Grand Trunk R.W. Co. v. Levis*, 10 R.L. 612. Where a mining company was empowered to borrow money and mortgage its property upon a vote of the stockholders and directors the company was made liable on the loan obtained by the directors without such vote, on the ground that the lender was justified in assuming that there had been a meeting and vote of the shareholders in the manner directed: *Royal British Bank v. Turquand, supra*; and the omission of preliminaries of corporate meetings, such as the publication of notices or the manner of conducting the meetings, or the appointment and election of directors, would not invalidate securities in the hands of innocent holders: *Brock v. Toronto, &c., R.W. Co.*, 17 Gr. 425. But where the irregularity is one appearing on the face of the instrument itself the purchaser is bound to take notice of it: *Athenæum, &c., Co.*, 4 K. & J. 549; *Geddes v. Toronto Street R.W. Co.*, 14 U.C.C.P. 513; *Commercial Bank v. Great North Western R.W. Co.*, 3 Moore N.S. 313, 314; and it has been held in *D'Arcy v. Tamar*, L.R. 2 Ex. 159, that the holder of a bond sealed with the company's seal could not sue the company upon it where it was proved that the directors who had authorized the seal to be

affixed had done so separately and privately instead of acting formally as a Board. As pointed out in *Browne & Theobald*, 3rd Ed., at p. 110, this decision appears to be somewhat at variance with *Fountaine v. Carmarthen R.W. Co.* and other cases cited above, and where debentures were irregularly issued by a municipality, but it was stated in the statute authorizing the issue that it should be taken and considered that everything required by the Act in order to the issuing of the debentures had been done according to their terms the defendant and the municipality were estopped from setting up or attempting to prove the irregularities: *Jones v. Municipality of Albert*, 20 N.B.R. 78, 21 N.B.R. 200, and see *Zabriskie v. Cleveland*, 23 How. (N.Y.) 381.

2. The directors may issue, and sell or pledge, all or any of the said securities, at the best price, and upon the best terms and conditions which at the time they may be able to obtain, for the purpose of raising money for prosecuting the said undertaking. Disposal
of bonds.

Issue of Bonds. In order to constitute a proper issue of bonds there must be a delivery with an intention on the part of the obligors that they should become operative in the hands of the persons to whom they were delivered. And where debentures were prepared being made payable to bearer and were placed in a box, the key of which was kept by the secretary, but the box itself was deposited in the office of the company which was also the office of one of its directors who had made large advances to it, it was held that such bonds were not delivered to the director, nor had he any right to deliver them to other people as there had been no sufficient issue of them: *Mowatt v. Cassel, &c.*, 34 Ch.D. 58.

It follows from the *Mowatt Case* that a bond cannot properly be said to be issued until a valid delivery of it has been made, but the term may be used in a secondary and less formal sense to signify the preparation, signing and sealing of the document and placing it absolutely out of the possession and control of the company. In this respect a bond, like any other deed, must be delivered as well as executed before it can take effect, and it is only when issued to another as obligee or promisee that the instrument becomes an obligation of the company: *West Cumberland Iron Co. v. Winnipeg, etc., R.W. Co.*, 6 Man. L.R. 388, at p. 395.

Negotiability of Bonds Payable to Bearer. In England bonds payable to bearer are negotiable instruments and valid in the hands of *bona fide* holders without notice as a bank note or promissory note may be before it is due: *Venables v. Baring* (1892), 3 Ch. 527; and they may be, and sometimes have, been made negotiable by statute, and where such statutory enactment exists the obligor cannot attack them in the hands of a *bona fide* holder without notice on the ground that they have been stolen from the obligee: *Trust, etc., Co. v. Hamilton*, 7 U.C.C.P. 98; and where a debenture is payable to "Bearer," the court will take judicial notice that it is a negotiable instrument and unimpeachable in the hands of a *bona fide* holder without notice: *Edlstein v. Schuler* (1902), 2 K.B. 144. In Canada bonds payable to bearer have also been treated as negotiable instruments: *McFarlane v. St. Cesaire*, M.L.R. 2 Q.B. 160, 14 S.C.R. 738; *Bank of Toronto v. Cobourg*, 7 O.R. 1; but see *Young v. MacNider*, Q.R. 4 S.C. at p. 211, 3 Q.B. 539, 25 S.C.R. 272.

Following what has been said in the notes to sub-sec. 1 of this section it may be mentioned that the rights of a *bona fide* holder of the bonds without notice prevail over an execution creditor, though the bonds have been irregularly issued and no directors of the company have been validly appointed: *Duck v. Tower, &c., Co.* (1901), 2 K.B. 314.

Pledge of Bonds. Directors would apparently have implied power to pledge bonds for the purposes of the undertaking, but such a power is expressly given by this statute: See *Winnipeg, etc., R.W. Co. v. Mann*, 7 Man. L.R. 81 and 93; but a pledgee cannot exercise the general powers of a holder until he has got rid of the equitable interest in the pledgor either by foreclosure or by whatever proceedings are prescribed by the terms of any agreement under which he holds his debentures: *Ibid.* And a power of sale given to such a pledgee gives him only a right to sell the bonds and not the property which they purport to secure: *Ibid.*, and see *Nova Scotia Central R.W. Co. v. Halifax Banking Co.*, 23 N.S.R. 172; 21 S.C.R. 536. A pledge of bonds to a bank makes the latter a mortgagee of them only and not a trustee and liable as such for the due administration of the property upon which they form a charge: *Nova Scotia Central R.W. Co. v. Halifax Banking Co.*, *supra*.

Sale at a Discount. As pointed out in White's Canadian

Company Law 391, the power to issue bonds at less than their face value is in effect an authority to a company to pay more than the statutory rate of interest. This statutory authority is in accordance with the general principle laid down in such cases as *Anglo, etc., Co.*, 20 Eq. 339; *Compagnie Général*; *Campbell's Case*, 4 Ch. D. 470; but a bare power to borrow money does not justify an agreement to sell debentures at a discount: *West Cornwall R.W. Co. v. Mowatt*, 17 L.J. Ch. 366, *sed quære*.

“*Raising Money.*” This term should be liberally construed to enable a railway company to acquire funds for its undertakings: *Winnipeg, &c., R.W. Co. v. Mann*, 7 Man. L.R. 81; *Regent's Canal, etc., Co.*, 3 Ch. D. 43.

3. No such security shall be for a less sum than one hundred dollars. Amount of bonds, etc.

4. The power of issuing securities conferred upon the company hereby, or under the Special Act, shall not be construed as being exhausted by such issue; and such power may be exercised from time to time; but the limit to the amount of securities fixed in the Special Act shall not be exceeded: Provided that no power to issue or dispose of any such securities under any Special Act of the Provincial Legislature, in connection with a railway coming under the legislative authority of the Parliament of Canada, shall be subsequently exercised without the sanction of the Governor in Council. 51 V., c. 29, s. 93, Am. by 55-56 V., c. 27, s. 4, Am. Extent of borrowing power.

Proviso: as to provincial railway coming under authority of Parliament.

After the word “issue” in the third line of this sub-section the words “Upon the bonds constituting such issue being withdrawn or paid off and duly cancelled” were inserted by 55 and 56 Vict., cap. 7, sec. 4; but they have been again left out in the present sub-section. The proviso beginning in the sixth line is inserted for the first time and makes the issue of bonds under any Provincial Special Act of Incorporation dependent not only upon the terms of the Special Act, but also upon permission being given by the Governor in Council. From the language of Osler, J.A., in *Bowen v. Canadian Southern R.W. Co.*, 14 A.R. 1, at p. 10, as follows: “As to their main line and Welland and

other branches they were incorporated by Ontario Acts, and although they are now subject to Dominion legislation alone, having been declared to be a work for the general advantage of Canada, I do not concede that the provisions of their Special Acts are thereby necessarily superseded;" it would appear that without some such express enactment the bonding privileges given by the Special Provincial Act might have been exercised without supervision by the Dominion Government but for the express terms of this proviso.

Extent of Borrowing Powers. Generally a company cannot borrow more money than the Acts providing for the issue of debentures permit: *Re Pooley, &c., Co.*, 21 L.T.N.S. 690; and all statutory conditions precedent must be complied with or the issue will be invalid: *Wales v. Ropert*, L.R. 8 C.P. 477; *Beaver, &c., Co. v. Spires*, 30 U.C.C.P. at pp. 343 *et seq.*; and so where it is provided that a certain proportion of the capital must be subscribed and paid or that the undertaking must begin to be productive before the bonds can be issued, the performance of these conditions are essential to the validity of the bonds: *Re Bagnallstown, &c., R.W. Co.*, Ir. L.R. 4 Eq. 526; and see *Re Cork, &c., R.W. Co.*, 21 L.T.N.S. 738; but there may be a subsequent statutory waiver of any such non-compliance: *Commercial Bank v. Great Western R.W. Co.*, 3 Moore N.S. 295; and such a waiver may be accomplished even by an incorrect recital in the Act authorizing the issue of bonds: *Quebec v. Quebec Central R.W. Co.*, 10 S.C.R. 563; and under the English Companies Act of 1900, 63 and 64 Vict., cap. 48, sec. 14, power is given to cancel unissued debentures and issue fresh debentures instead up to the full limit of the company's statutory borrowing powers: *Re North Defries, &c., Co.* (1903), W.N. 194; (1904), 1 Ch. 37.

Mortgage
to secure
bonds.

Penalties
first
charge.

112. The company may secure such securities, by a mortgage deed creating such mortgages, charges and encumbrances upon the whole of such property, assets, rents and revenues of the company, present or future, or both, as are described therein; but such property, assets, rents and revenues shall be subject, in the first instance to the payment of any penalty then or thereafter imposed upon the company for non-compliance with the requirements of this Act, and next, to the payment of the working expenditure of the railway.

Compare 8 Vict., cap. 16, sec. 42. (Imp.)

This sub-section is taken with some unimportant variations from 51 Vict., cap. 29, sec. 94(1). In the former Act the "rents and revenues" only were to be subject to the payment of penalties; now the "property and assets" are expressly made liable as well.

Property Which May Be Mortgaged. The English statute in terms includes unpaid calls amongst the classes of property belonging to the company which may be mortgaged. No similar power is given in the present Act, and in Quebec (without express power) a mortgage of calls due in respect of unpaid capital can no more be made than a mortgage of any other species of after-acquired property: White, p. 396, Civil Code Art. 1983. The subject has not been much discussed in the other provinces, but in England it may be said that while mortgages of unpaid calls have been looked upon with disfavour, yet when the power to mortgage apparently includes all property that the company may lawfully own, a mortgage of the unpaid capital will be upheld: *Newton v. Debenture Holders, &c., Co.* (1895), A.C. 244, approving *Re Pyle Works*, 44 Ch. D 534. And so a power to mortgage a company's "assets" gives a power to mortgage calls: *Page v. International*, 68 L.T. 435; but a power to charge "property" or "property and funds" does not do so: *Bank of South Australia v. Abrahams*, L.R. 6, P.C. 265; *Bower v. Foreign Gas Co.*, W.N. (1877) 222. A mortgage of arrears of calls already made and unpaid is valid: *Re Humber*, 11 W.R. 474, 667; and so is a mortgage of the proceeds of a call not yet made, but already determined upon: *Re Sankey, etc., Co.*, 9 Eq. 721; *Pickering v. Ilfracombe R.W. Co.*, L.R. 3, C.P. 235, 247.

After-Acquired Property. It is expressly provided that a mortgage may be made of property which the company does not own at the date thereof, but the mortgage would, of course, have to include it by apt words. Apart from the statute Courts of Equity have long upheld such mortgages so far as they did not conflict with the rights of subsequent purchasers for value without notice: *Holroyd v. Marshall*, 10 H.L. Cas. 191; *Robertson v. Morton*, 1 D. & W. 195; *Haley v. Halifax Street R.W. Co.*, 25 N.S.R. 140; *Kirkpatrick v. Cornwall, etc., R.W. Co.*, 2 O.L.R. 113.

Questions sometimes arise whether the property is so reduced into possession by the company as to become subject to the mort-

gage. Where a mortgagor purchases property and gets a mortgage back for part of the purchase money, the deed and mortgage are regarded as one transaction and a general mortgage or lien upon all the company's property will not rank in priority to the mortgage for the purchase money: *White's Canadian Company law*, 395; *United States v. New Orleans R.W. Co.*, 12 Wall (U.S.) 362, and in the United States a mechanics' lien upon property acquired after the mortgage has been given takes precedence of such mortgage though it expressly includes "after-acquired property:" *Williamson v. New Jersey, etc., R.W. Co.*, 27 N.J. (Eq.) 277; but in Ontario it has been decided that a mechanic's lien under the Mechanics' Lien Act has no greater right to priority than writs of execution and will not attach as against a mortgage previously given covering after-acquired property: *Brown v. Midland R.W. Co.*, 26 Gr. 225; *King v. Alford*, 9 O.R. 643; and the same rule has been adopted in *British Columbia & Larsen v. Nelson, etc., R.W. Co.*, 4 B.C.R. 151; and see also *Wallbridge v. Farwell*, 18 S.C.R. 1.

A mechanics' lien being in any case a charge under a provincial act which is designed if it takes effect at all to change the ownership of property which is acquired for railway purposes, it has been decided in the *Larsen Case* that it would not attach against any property of a railway which is subject to the jurisdiction of the Dominion of Canada, and see further on this the notes preceding sec. 3, *ante*.

Mortgage of Rolling Stock. Under Quebec law rolling stock becomes immovable and therefore realty by destination as soon as it is delivered to the railway company and put into operation by it: *Abbott on Railways*, 107; *Civil Code*, 379; and therefore the unpaid vendor of cars supplied loses his lien as against a mortgagee of lands of a company: *Wallbridge v. Farwell*, 18 S.C.R. 1; *Grand Trunk R.W. Co. v. Eastern Townships Banks*, 10 L.C.J. 11; and the same result follows and the same rule applies in Ontario: *Kirkpatrick v. Cornwall, etc., R.W. Co.*, 2 O.L.R. 113, and in England *Re Liskeard, etc., R.W. Co.* (1903), 2 Ch. 681, where, however, rolling stock is the subject of an express enactment, 30 & 31 Viet., cap. 127, sec. 4.

Rails, Ties and Superstructure. When affixed to the land these become real estate and so would pass under a mortgage of the company's lands: *Great Western R.W. Co. v. Rouse*, 15

U.C.R. 168; and therefore take priority over a vendor's lien: *Lanark v. Cameron*, 9 U.C.C.P. 109, or an execution: *Kirkpatrick v. Cornwall, etc., R.W. Co., supra*. But where they were not incorporated with the rest of the railway property so as to become fixtures and as such part of the land the reverse is the rule: *Wyatt v. Levis, etc., R.W. Co.*, 6 Q.L.R. 213.

Mortgage on Revenues. While the company remains in possession of the road the right to apply enough of the income or any surplus income to operate the road cannot be questioned: *Abbott on Railways*, 106; *Gilman v. Illinois, etc., Co.*, 91 U.S. 603; and even though interest is in arrears the mortgagees cannot take possession of the earnings or claim priority over a creditor who has attached such earnings until a receiver of the property has been appointed or the property has in some other way been reduced into possession by them: *Phelps v. St. Catharines, etc., R.W. Co.*, 18 O.R. 581, 19 O.R. 501; *Swiney v. The Ennis-killen, etc., R.W. Co.*, 2 Ir. R. (C.L.) 338.

2. By the said mortgage the company may grant to the holders of such securities, or the trustees named in such mortgage, all and every the powers, rights and remedies granted by this Act in respect of the said securities, and all other powers, rights and remedies, not inconsistent with this Act, or may restrict the said holders in the exercise of any power, privilege or remedy granted by this Act, as the case may be; and all the powers, rights and remedies, so provided for in such mortgage, shall be valid and binding and available to the said holders in manner and form as therein provided.

Powers which may be granted in mortgage.

Formerly 51 Vict., cap. 29, sec. 94 (2).

3. The company may except from the operation of any such mortgage deed any assets, property, rents or revenue of the company, and may declare and provide therein that such mortgage shall only apply to and affect certain sections or portions of the railway or property of the company; but where any such exception is made the company shall in such mortgage deed expressly specify and describe, with sufficient particularity to identify the

Property excepted from operation of mortgage.

same, the assets, property, rents or revenue of the company, or the section or portions of the railway, not intended to be included therein or conveyed thereby.

This sub-section is new. In Quebec it has been held that a portion of a railway could not be sold, but that it must be sold as a whole: *Stephen v. Hochelaga Bank*, M.L.R., 2, Q.B. 491; but it was subsequently decided in that province that section 278 of 51 Vict., cap. 29 (now re-enacted as sec. 240, sub-sec. 1, *post*), has made a sale of part of a railway possible, provided that part could be treated as an integer and be successfully operated by itself as a railway: *Redfield v. Wickham*, 13 A.C., at pp. 476 and 477; and on this ground it was held that a section of a railway might be validly mortgaged, yet where part of that section was in one province and part in another the courts of one province could not authorize the sale under such a mortgage even of that part within their jurisdiction: *Grey v. Manitoba, etc., R.W. Co.*, 11 Man. L.R. 42, (1897), A.C. 254. It becomes a question therefore whether the expression "sections or portions" in this new clause gives a right to mortgage a portion of a railway which is not an integer so that mortgagees may exercise their remedies against the portions described without regard to its effect upon the rest of the railway. Sec. 240, sub-sec. 1 (*post*), preserves the phraseology of the corresponding sections in the former Acts and so it is probable that no new right of sale is given, but it may be that for the purpose of appointing a receiver a distinction is to be made between the word "section," which has been heretofore construed to mean an integer, and the word "portion," which is new and has not yet received judicial construction in this connection.

Where part of the company's property or assets are by the trust deed expressly excepted from the operation of a mortgage the case of *Wickham v. New Brunswick, etc., R.W. Co.*, L.R. 1, P.C. 64, would probably govern and the proceeds of a sale of such excepted portion would also be free from the operation of the mortgage: *Ibid.* p. 80.

Mortgage
to be
deposited
with

4. Every such mortgage deed and every assignment thereof or other instrument in any way affecting such mortgage or security shall be deposited in the office of the Secretary of State

of Canada, of which deposit notice shall forthwith be given in *The Canada Gazette*. Such mortgage deed or other instrument need not be registered under the provisions of any law respecting registration of instruments affecting real or personal property. Secretary of State and notice given.

This is taken from 51 Viet., cap. 29, sec. 94 (3). The provision is considerably altered by requiring that assignments as well as the mortgages themselves shall be deposited in accordance with this and the succeeding sub-section and also by the provision that the local laws respecting registration shall not apply. The provision as amended is no doubt intended to provide a uniform method of registration for all mortgages of the real or personal property of railways which are subject to the jurisdiction of the Federal Government in place of the diverse laws upon that subject which exist in each of the provinces. But it is to be observed that there is no provision that the holders under a mortgage registered as required by this section shall take any priority to those who may claim under a prior unregistered mortgage, though section 113, sub-sec. 1, provides that securities "hereby authorized to be issued shall be the first preferential claim" upon the company. This would probably be construed to mean that those who had complied with the terms of the statute by depositing their securities with the Secretary of State would take priority over those who did not. For a discussion of this subject under a somewhat similar provision in the Province of Quebec see White's Canadian Company Law, pp. 379 to 386.

The added clause doing away with the other forms of registration is permissive in its terms, and persons claiming under specific securities may perhaps even yet *ex abundanti cautela* desire to register according to the requirements of provincial laws for the purpose of preserving their priority.

5. A copy of any such deed or instrument so deposited, certified to be a true copy by the Secretary of State, or by the Deputy Registrar-General of Canada, shall be received as *prima facie* evidence of the original in all courts without proof of the signature of such official. (New.) Evidence.

113. The securities, hereby authorized to be issued shall be taken and considered to be the first preferential claim and charge Bonds to be a first charge.

upon the company, and the franchise, undertaking, tolls and income, rents and revenues, and real and personal property thereof, at any time acquired, save and except as provided for in the next preceding section.

Formerly sec. 95 (1). Compare 8 Vict., cap. 16, sec. 42 (Imp.).

Definitions. The word "franchise" is a wide term which has been defined to be a special privilege emanating from the Government by a legislative or royal grant: Standard Dictionary "Franchise and License." See also *Re City of Toronto and Toronto Street R.W. Co* 22 O.R. 374, at p. 396, and 21 Can. L.T. 435.

The word "undertaking" is defined by sec. 2, sub-sec. (bb), *ante*; and the word "tolls" by sec. 2, sub-sec. (x), *ante*.

Priorities. As bonds issued under the authority of this Act are to be a first preferential claim upon the company and whatever property is mortgaged to secure them the question of priority as between bondholders cannot well arise. Where, however, these bonds have been pledged to more than one person a question sometimes comes up as to which of one or more holders is entitled to the proceeds of these assets when realized in priority to others also claiming in respect of them. Instances of questions of this character may be seen in *Nova Scotia Central R.W. Co. v. Halifax Banking Co.*, 23 N.S.R. 172, 21 S.C.R. 536; *Pratt v. Consolidated, etc., Co.*, 34 N.B.R. 33.

Where under the Special Act a railway is authorized to issue preferential bonds for raising money for the purpose of forwarding its undertaking it cannot pledge such bonds to a municipality as security for a bonus voted to it by the latter: *Eldon v. Toronto, etc., R.W. Co.*, 24 Gr. 396.

A statute incorporating a railway company provided that under certain conditions the railway company's charter shall become forfeited and the property revert to the Crown; upon these conditions happening it was held that the security which had been mortgaged to the debenture-holders under the terms of the mortgage deed had passed to the Crown by virtue of the breach of the conditions which were the subject of the forfeiture and the Crown took it freed from any liability to the debenture-holders: *Coates v. The Queen* (1900), A.C. 217.

2. Each holder of the said securities shall be deemed to be a ^{Holder} mortgagee or encumbrancer upon the said securities *pro rata* ^{of bonds} with all the other holders; and no proceedings authorized by law ^{a mort-} or by this Act shall be taken to enforce payment of the said securities, or of the interest thereon, except through the trustee or trustees appointed by or under such mortgage deed. 51 V., c. 29, s. 95.

Compare 8 Vict., cap. 19, secs. 42 and 44 (Imp.).

The holder of bonds pledged does not become a trustee of the property mortgaged on behalf of the company and there is nothing to prevent him from buying in the property upon a sale being validly made under the terms of the debentures or the agreement pledging the same with him: *Nova Scotia, etc., R.W. Co. v. Halifax Banking Co.*, 23 N.S.R. 172, 21 S.C.R. 536; the fact that bondholders are to share *pro rata* in the property mortgaged gave rise in a case of *Pratt v. Consolidated, etc., Co.*, 34 N.B.R. 33, to a peculiar situation. There was a fund in Court applicable to the payment of a proportion of the indebtedness due upon bonds issued by several companies which eventually amalgamated under the name of the defendant company. The latter issued its bonds in exchange for debentures of the companies that took it over, and most of the old debenture holders made the exchange; bondholders to the extent of \$32,000, however, refused to exchange for the new debentures and claimed the whole of the moneys in court. It was held, however, that the other bonds had not been redeemed so as to reduce the total issue outstanding to \$32,000, and that they were not entitled, therefore, to the whole of the funds in court, but only to the proportion which their bonds bore to the total issue.

Rights of Bondholders. Notwithstanding the provision in this sub-section that the remedies given by the statute can be enforced by the trustee only, it is said that any bondholder might, in the interest of the class which he represents, bring an action to protect or realize upon the securities mortgaged where the trustee fails or refuses to act: Jones on Railroad Securities, sec. 362; Abbott on Railways, p. 126. But the contingencies upon which trustees are to act and the possible results of their refusing to act are generally expressly provided for by the deed

of trust. In Quebec bondholders have, in the interest of their class, been allowed even before default to apply to restrain a company from proceeding illegally and in a manner that would depreciate the security: *Wyatt v. Senecal*, 4 Q.L.R. 76; and where a trustee has acted in collusion with the company to the prejudice of bondholders an action by the latter to restrain illegal and prejudicial dealings with the property has been successful: *Murdock v. Woodson*, 2 Dill. 188; *Weetjen v. St. Paul, etc., R.W. Co.*, 4 Hun. 529.

Position of Trustees. Trustees are not liable for goods supplied or debts contracted before they entered into possession: *Wallbridge v. Farwell*, 18 S.C.R. 1. But they become liable as common carriers to shippers of goods to the same extent that the railway itself would have been: *Daniels v. Hart*, 118 Mass. 543. They must protect the security they hold to the best of their ability: *Jones' Railroad Securities*, sees. 358, 362. They may not assent on behalf of the bondholders to other charges taking precedence over the claims of their *cestui que trust*: *Duncan v. Mobile, etc., R.W. Co.*, 2 Woods 542; but bondholders may, with the consent of the majority of trustees, postpone their securities, though they cannot by such consent postpone also the securities of such bondholders as do not assent: *Green v. Ruggles*, 31 N.B.R. 679. Affirmed by the Privy Council 21 Can. Gazette 415. They can, as plaintiffs, bring an action to enforce their rights under the mortgage deed: *Hatherton v. Temiscouata R.W. Co.*, Q.R. 12. S.C. 481, and notice to them is notice to the bondholders: *Müller v. Rutland, etc., R.W. Co.*, 36 Vt. 452.

Rights
of bond-
holders
on de-
fault by
company.

114. If the company makes default in paying the principal of, or interest on, any of such securities, at the time when such principal or interest, by the terms of the security, becomes due and payable, then at the next annual general meeting of the company, and at all subsequent meetings, all holders of such securities, so being and remaining in default, shall, in respect thereof, have and possess the same rights, privileges and qualifications for being elected directors, and for voting at general meetings, as would attach to them as shareholders if they held fully paid-up shares of the company to a corresponding amount.

2. The rights given by this section shall not be exercised by any such holder, unless it is so provided by the mortgage deed, nor unless the security, in respect of which he claims to exercise such rights has been registered in his name, in the same manner as the shares of the company are registered, at least ten days before he attempts to exercise the right of voting thereon; and the company shall be bound on demand to register such securities, and thereafter any transfers thereof, in the same manner as shares or transfers of shares.

Limitations affecting such rights.

Registration.

3. The exercise of the rights given by this section shall not take away, limit or restrain, any other of the rights or remedies to which the holders of the said securities, are entitled under the provisions of such mortgage deed. 51 V., c. 29, s. 96.

Other rights not affected.

There is no similar provision to this in the English Act.

Bondholders' Right to Vote. This section confers a general right upon bondholders to vote at the next annual meeting, provided the conditions imposed by it and by the trust deed, if any, are complied with: See *Montreal, etc., R.W. Co. v. Hochelaga Bank*, 27 L.C.J. 164. It does not in terms deprive shareholders of their power to vote or give any right to appoint directors against the will of the shareholders, unless the number of bonds represented at the meeting should outweigh the number of shares so represented: *Re Osler and Toronto, etc., R.W. Co.*, 8 P.R. 506; *Re Johnson & Toronto, etc., R.W. Co.*, *ibid.* 535; *Hendrie v. Grand Trunk R.W. Co.*, 2 O.R. 441; and bondholders represented at such a meeting have only one vote for each bond they hold.

This was decided where each bond was for £100 and each share for \$50: *Bunting v. Laidlaw*, 8 P.R. 538. If a company is shown to be unable to pay its interest the mere fact that interest coupons have not been presented at the time and place provided for payment will not deprive the holders of their right to register and vote: *Re Thomson & Victoria R.W. Co.*, 9 P.R. 119; and where debentures were to be handed to creditors in case of non-payment of money due for advances; the mere fact of default in payment of the advances entitled the creditors to register and vote in spite of the contention that the latter had not the absolute

beneficial right in themselves, but were in fact only pledgees of the bonds with power to sell them: *Re Thomson & Victoria R.W. Co.*, 8 P.R. 423; and proof of a demand upon an assistant secretary who performed all the duties of secretary is sufficient to entitle a bondholder to compel registration: *Re Thomson & Victoria R.W. Co.*, 9 P.R. 119; the holders of bonds who desire to vote must be prepared to make out a *prima facie* transfer to themselves, but no special provision by by-law for their registration is necessary, and the mere fact that the bondholders were directors of the company is no objection to registration where there is nothing to show that they have not complied with all the formalities required by the statute: *Re Thomson & Victoria R.W. Co.*, *supra*; nor is it necessary for the holder of bonds payable to "bearer" to register the successive transfers to himself as is required by the Acts in the case of shares: *Re Osler & Toronto, etc., R.W. Co.*, 8 P.R. 506; but the bondholder himself must be registered as owner: *Re Johnson and Toronto, etc., R.W. Co.*, *ibid.* 536. Bondholders are not confined to the right to vote for directors, but may vote on any business properly coming before an annual meeting, but apparently without express statutory authority (which does not appear in the above section), they cannot vote at a special meeting: *Hendrie v. Grand Trunk R.W. Co.*, 2 O.R. 441. This case also decides that where bondholders are given the right to vote at a meeting any action taken at that meeting without counting their vote will be invalid.

How Registration Enforced. Although the prerogative writ of mandamus is not in Ontario applicable as a remedy to enforce specific performance of what are in effect mere personal contracts, even though validated by statute (*Grand Junction R.W. Co. v. Peterborough*, 8 S.C.R., at pp. 121 *et seq.*), yet this has been held to be the appropriate method of enforcing registration under the Act: *Re Thomson & Victoria R.W. Co.*, 9 P.R. 119; *Re Osler & Toronto, etc., R.W. Co.*, 8 P.R. 506; *Re Johnson v. Toronto, etc., R.W. Co.*, *ibid.* 535. For a further discussion of this subject see 1 Can. Ry. Cases 295.

Presentation for Payment—Interest. Where a bond is made payable upon presentation at a particular time and place, presentation in accordance with the terms of the bond must be averred in an action upon it after default: *Osborne v. Preston, etc., R.W. Co.*, 9 U.C.C.P. 241. The case of *Fellowes v. Ottawa Gas*

Co., 19 U.C.C.P. 174, is not in accordance with this, but in the case of *Montreal City Bank v. Perth*, 32 U.C.C.P. 18, where both cases were considered, the decision in the earlier case was adopted. If, however, it could be shown that the company was unprepared to pay, even though presentation were regularly made, this formality will be dispensed with: *Re Thomson & Victoria R.W. Co.*, 9 P.R. 119; but where the company had funds at the place of payment, but the bond was not then nor for a long time afterwards presented for payment, it was decided that the fact of the bond never being in plaintiff's possession, but in the possession of defendant's solicitor at plaintiff's request was no excuse for failure to present when due and plaintiffs were not allowed interest upon the bond after default: *McDonald v. Great West R.W. Co.*, 21 U.C.R. 223. In *McKenzie v. Montreal, etc., R.W. Co.*, 27 U.C.C.P. 224, the court refused to take judicial notice of what a "coupon" was, and refused to treat an assignment of a "coupon and all claims in respect thereof" as an assignment of a covenant by a company to pay interest upon a bond. Where bonds are made payable to bearer and coupons for interest are assigned by the bondholder to a purchaser for value without notice, the latter takes them freed from any equities existing between the company and the bondholder: *McKenzie v. Montreal, etc., R.W. Co.*, 29 U.C.C.P. 333. Where interest is due under a coupon the right to recover is only barred after twenty years: *Toronto General Trusts Corporation v. Central Ontario R.W. Co.*, 3 Can. Ry. Cas. 339, 4 *ib.*

Other Remedies—Receiver. Apart from the statutory right of voting and taking part in the management of the company after default or taking proceedings to sell the undertaking as already mentioned the usual remedy of bondholders is the appointment of a receiver. The cases in which the court will appoint a receiver of any company are enumerated in Abbott on Railways, 125 and 126 as follows:

1. At the suit of mortgagees or of bondholders who have a lien on the corporation property: *Furness v. Caterham R.W. Co.*, 25 Beav. 614; *Peto v. Welland R.W. Co.*, 9 Gr. 455.

2. At the suit of creditors who have obtained judgment which they cannot collect by execution: *Evans v. Coventry*, 5 D. M. & G. 911.

3. At the suit of any creditor or stockholder interested in the funds of the company where there is a breach of duty on the part

of directors and a loss or threatened loss of funds: *Potts v. Warwick, etc., Co.*, Kay 142; *Whitworth v. Gaugain*, 3 Hare 416; *Ames v. Birkenhead Docks*, 20 Beav. 332; *Peto v. Welland R.W. Co.*, 9 Gr. 455.

4. Where a state of things exists in which the governing body are so divided that they cannot act together: *Featherston v. Cooke*, 16 Eq. 298; *Trade Auxiliary Co. v. Vickers*, *ibid.* 303.

5. Where a company has practically ceased to do business: *Warren v. Fake*, 8 Hare Pr. 430.

6. Where a company is dissolved and has no officer to attend to its affairs: *Hamilton v. Transit Co.*, 26 Barb. 46; *Murray v. Vanderbilt*, 39 Barb. 140; *Lawrence v. Greenwich, etc., Co.*, 1 Paige 587.

In Quebec the office of receiver is not recognized and there was some doubt whether a court had power to appoint a "sequestrator:" *Morrison v. Grand Trunk R.W. Co.*, 5 L.C.J. 313; but in *Lambe v. Montreal, etc., R.W. Co.* (1891), (not reported), it was decided that a sequestrator might be appointed, and in *Abbott on Railways*, p. 126, it is contended that this view is a sound one. The duties of a receiver in Ontario are stated to be the receiving of gross receipts of the company from the carriage of mails, freight, passengers, etc., and the paying of the running expenses thereout: *Simpson v. Ottawa, etc., R.W. Co.*, 1 Ch. Chrs. 126, 337, 10 U.C.L.J. (O.S.) 108; and while in *Galt v. Erie, etc., R.W. Co.*, 14 Gr. 499, a receiver or manager was appointed, it has been decided that courts in this country have no power to appoint a manager as such: *Allan v. Manitoba, etc., R.W. Co.*, 10 Man. L.R. 106. In England power is expressly given by 30 & 31 Viet., cap. 127, sec. 4, to appoint a manager: see *Gardner v. London, etc., R.W. Co.*, L.R. 2, Ch. 201; *Bartlett v. West Metropolitan, etc., Co.* (1893), 3 Ch. 437, but no similar statute exists in Canada. By the appointment of a receiver the management of the road is not necessarily interfered with, but is still left to the directors subject to the right of the receiver to watch the expenses: *Lee v. Victoria R.W. Co.*, 29 Gr. 111, and to remonstrate when in his opinion they are needless and excessive, or if necessary apply to the court to have improper expenditures stopped: *Simpson v. Ottawa, etc., R.W. Co.*, *supra*. A receiver should pay out of the moneys coming to him the expenses of the undertaking, the interest of the mortgagees and the balance in to court: *Ames v. Birkenhead Docks*, 20 Beav. 332, subject, however, to the pay-

ment of penalties provided for by this Act: *Ante*, sec. 112 (1). Where a line is not open for public traffic and there is not, and is not likely to be any money for a receiver to receive, one ought not to be appointed even though there may be jurisdiction to do so, which is doubtful: *Re Knott End Railway Act, 1898* (1901), 2 Ch. 8. When a receiver is appointed and put in control of the road the indebtedness which he incurs in the necessary operation and maintenance of the road is described as "working expenditure." This term is defined by section 2 (*cc*), *ante*, and includes wages (*Allan v. Manitoba, etc., R.W. Co.*, 13 C.L.T. 349), necessary repairs (*Sage v. Shore Line R.W. Co.*, 2 Can. Ry. Cases 271), but does not necessarily include all expenses of operation and management incurred under an order of the court: *Charlebois v. Great, etc., R.W. Co.*, 11 Man. L.R. 42 and 135, nor in England costs of defending an action to establish claims prior to the receivership: *Re Wrexham, etc., R.W. Co.* (1900), 1 Ch. 261, 2 Ch. 436.

115. All such securities may be made payable to bearer, and shall, in that case, be transferable by delivery until registration thereof, as hereinbefore provided, and, while so registered, they shall be transferable, by written transfers, registered in the same manner as in the case of the transfer of shares. 51 V., c. 29, s. 97. Transfer of bonds.

Compare 8 Viet., cap. 16, secs. 45 and 47 (*Imp.*).

Debentures are not void because they are not made payable to any particular person as their legal effect in that case is an undertaking to pay the amount secured to any one to whom they may be delivered, who upon delivery to him thereby becomes the payee: *Geddes v. Toronto Street R.W. Co.*, 14 U.C.C.P. 513.

As mentioned before debentures payable upon delivery are negotiable instruments transferable by endorsement or mere delivery: *Eastern Townships v. Compton*, 7 R.L. 446; *McFarlane v. St. Césaire*, M.L.R. 2, Q.B. 160, 14 S.C.R. 738; and the mere fact that they are under seal and are made by statute a charge upon the company's property does not deprive them of their negotiable character: *Bank of Toronto v. Coburg, etc., R.W. Co.*, 7 O.R. 1; and this case also decides that the strict rules of common law applicable to deeds does not apply, but rather the rules of the law merchant; and so the fact that debentures are issued

with the name of the payee in blank and that name is afterwards filled in by the company's secretary does not invalidate them.

As against a transferee for value without notice the company cannot set up that the bonds were improperly issued: *Webb v. Herne Bay*, L.R. 5 Q.B. 642; and where there has been no legal transfer the company cannot set up against the equitable transferee any claims it may have against the transferor, even though he may upon the register still appear as the legal owner: *Re Romford Canal Co.*, 24 Ch. D. 85; nor can it set off against the assignee rent due from the assignor since his assignment: *Watson v. Mid Wales R.W. Co.*, L.R. 2, C.P. 593.

Power to
borrow
money
by over-
draft, etc.

116. The company may, for the purposes of the undertaking, borrow money by overdraft or upon promissory note, warehouse receipt, bill of exchange or otherwise upon the credit of the company and become party to promissory notes and bills of exchange; and every such note or bill made, drawn, accepted or endorsed, by the president or vice-president of the company, or other officer authorized by the by-laws of the company, and countersigned by the secretary of the company, shall be binding on the company; and every such note or bill of exchange so made, drawn, accepted or endorsed shall be presumed to have been made, drawn, accepted or endorsed with proper authority, until the contrary is shown; and in no case shall it be necessary to have the seal of the company affixed to such promissory note or bill of exchange, nor shall the president or vice-president or secretary or other officer of the company, so authorized be individually responsible for the same, unless such promissory note or bill of exchange has been issued without proper authority; but nothing in this section shall be construed to authorize the company to issue any note or bill payable to bearer, or intended to be circulated as money or as the note or bill of a bank. 51 V., c. 29, s. 98, Am.

No seal
necessary
Notes
not to
be pay-
able to
bearer.

The words "May borrow money by overdraft, etc.," are new.

As the section is now amended a railway is enabled to borrow money, not only by promissory notes and bonds, but by almost

any method now known in finance. In England where a similar power to make notes is not expressly given it has been laid down that it will only be implied where a company cannot do business without it, and in the case of railway companies it will not be inferred from a mere power to incur debts: *Bateman v. Mid Wales R.W. Co.*, L.R. 1, C.P. 499; but see *Re Peruvian R.W. Co.*, L.R. 2, Ch. 617. Before express power to make notes was given the same rule was laid down in Ontario: *Topping v. Buffalo, etc., R.W. Co.*, 6 U.C.C.P. 141; but sometimes such power was conferred by the company's special act: *Kingston, etc., R.W. Co. v. Gunn*, 3 U.C.R. 368. Debentures or coupons would not be treated as promissory notes where the company had no power to give such notes: *Geddes v. Toronto Street R.W. Co.*, 14 U.C.C.P. 513; where power is given to certain officers to make notes a note purporting to be made by the company but not signed by the persons authorized by statute or by-law is invalid: *Mechanics Bank v. Bramley*, 25 L.C.J. 256; *Jones v. Eastern Townships, etc., Co.*, M.L.R. 3, S.C. 413; and where the secretary of a company had power to make notes, but instead indorsed one for the accommodation of another, it was held that a person who took the note with knowledge of the circumstances could not recover from the company: *Union Bank v. Eureka, etc., Co.*, 33 N.S.R. 302; but in Quebec this defence would not be open to an indorser of a note made by a company who was himself being sued by another: *Ball v. Atlantic, etc., R.W. Co.*, 3 Que. P.R. 315. For a general recent discussion of this subject see *Bridgewater Cheese Co. v. Murphy*, 23 A.R. 66, 26 S.C.R. 443. Where an officer of a company makes a note having no power to do so the payee cannot sue that officer for the value of the note, as ignorance of his authority is ignorance of a matter of law not of fact and gives no cause of action: *Struthers v. Mackenzie*, 28 O.R. 381; particularly if the company has not repudiated its liability: *Bank of Ottawa v. Harrington*, 28 U.C.C.P. 488.

PART VII.

CONSTRUCTION OF RAILWAY.

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 Sale and conveyance, 144 to 151.

Limitation of Time for Construction.

Time
for con-
struction

117. If the construction of the railway is not commenced and fifteen per cent. on the amount of the capital stock is not expended thereon within two years after the passing of the Act authorizing the construction of the railway, or if the railway is not finished and put in operation within five years from the passing of such Act, then the powers granted by such Act or by this Act shall cease and be null and void as respects so much of the railway as then remains uncompleted. 51 V., c. 29, s. 89, Am.

This section was altered by substituting the word "five" for "seven" in the fifth line.

A somewhat similar provision will be found in the English Tramways Act, 33 & 34 Viet., cap. 78, sec. 18, and under it it

was held that "works" were not "substantially commenced" merely by purchasing land for the purpose of erecting a generating station or by giving an order for the execution of certain parts of the works; and it was further held that the "substantial commencement" of the works means the execution of physical works and not mere preliminary preparations: *Attorney-General v. Bournemouth Corporation* (1902), 2 Ch. 714; and see *Montreal, etc., R.W. Co. v. Chateauguay, etc., R.W. Co.*, 35 S.C.R. 48, and notes 4 Can. Ry. Cas. 83; and therefore the defendants were restrained from commencing or continuing to construct the tramways authorized by their provisional order. Where, however, a railway thirteen days before the time limited for exercising its powers of expropriation entered on lands, it was held that the entry was proper and the land being *bona fide* required for the purposes of the railway, the defendants could not be restrained from entering even though they could not possibly complete their railway within the time limited: *Tiverton, etc., R.W. Co. v. Loosemore*, 9 A.C. 480; and where by an Act passed on August 9th, 1899, the powers of the company to take lands were to cease three years after its enactment, it was held that the three years did not expire until after August 9th, 1902: *Goldsmiths Company v. West Metropolitan R.W. Co.* (1904), 1 K.B. 1.

Where a railway company enters on land and its charter then expires, but is revived by a subsequent Act and all property previously acquired is vested in the revived company, the land which the company whose charter has expired had expropriated does not revert to the former owner or to the Crown, but remains sufficiently vested in the old company to permit of its conveyance to the company as revived: *Grand Junction R.W. Co. v. Midland*, 7 A.R. 681.

Where a railway company had surveyed and filed plans for one-third of its length and had done some construction work such as grading, blasting and felling trees, this was held to be sufficient evidence that the company had commenced operations within the meaning of its charter to prevent a forfeiture, and as the railway was authorized to construct in sections it was not bound before beginning work to file plans of the whole line: *Ontario, etc., R.W. Co. v. Canadian Pacific R.W. Co.*, 14 O.R. 432.

In *Re Stratford, etc., R.W. Co. and Perth*, 38 U.C.R. 112, it was decided by a divided court that as the railway had not filed plans showing the whole of their route they could not exercise the powers conferred upon them by their charter. These cases are discussed in argument in *Yale Hotel Company v. Vancouver, etc., R.W. Co.*, 3 Can. Ry. Cases 108.

Effect of Forfeiture. Failure to commence operations within the required time does not extinguish the claims of creditors against the shareholders in respect of unpaid stock due under sec. 108, *ante*: *Hughes v. Lalonde*, 18 R.L. 205; *Ray v. Blair*, 12 U.C.C.P. 257; *Port Dover, etc., R.W. Co. v. Grey*, 36 U.C.R. 425.

A forfeiture may be waived by the Legislature which may, by special enactment, either expressly or impliedly continue the charter: *Toronto v. Crookshanks*, 4 U.C.R. 309; and see *Grand Junction R.W. Co. v. Midland*, 7 A.R. 681.

Where a company has failed to comply with the conditions precedent to beginning operations it has been held in Quebec that such non-compliance does not *ipso facto* operate as an extinction of the company nor a revocation of the charter as that can only be done at the suit of the Attorney-General and not by injunction or other proceeding taken by a private individual: *Roy v. La Compagnie, etc.*, 11 L.N. 359, 14 Q.L.R. 255; *Dominion Salvage Co. v. Attorney-General*, 21 S.C.R. 72; *Compagnie, etc., v. Rascony*, 20 L.C.J. 306; and the same rule has been laid down for Ontario by the Supreme Court: *Hardy v. Pickerel, etc., Co.*, 29 S.C.R. 216. But see *Hodgins v. O'Hara*, 38 C.L.J. 81, a decision of Lount, J., in an insurance case to the contrary.

General Powers.

By sec. 51, *ante*, the powers granted by this Act are conferred only upon companies incorporated by Special Act; by sec. 240, sub-sec. 4, where an individual purchases a railway or section of a railway he must apply for incorporation at the next session of Parliament. Sec. 118 also confers the powers granted therein upon the "company," which by sec. 2 (c), *ante*, means a railway company and includes any person having authority to construct or operate a railway. The only authority conferred upon a person to do so is given by sec. 240, *post*, and then only subject to the limitations therein contained. Apart from statute a receiver

might have power to construct or operate, but only so far as the court or the deed under which he acts gives that power to him. (See section 114, *ante*, and notes) and presumably an individual and not a company might be appointed under sections 285 and 289, *infra*, to carry out a scheme of arrangement propounded by the directors of an insolvent company. Apart from these provisions the powers conferred by the Act can only be exercised by a corporation and not by individuals who, while they might build and operate a railway, would not have any of the rights, privileges or immunities granted by this statute and their liability would depend upon the common law. They would thus have no power to enter on or injure the lands of others and would be liable for all damages caused by them in the nature of a nuisance or a trespass, whether they had been guilty of negligence or not. The result is that for all practical purposes no one but a corporation can build or operate a railway in Canada, nor can one railway exercise the powers conferred upon another unless the latter's charter powers have been conferred upon the former by statute: *Yale Hotel Co. v. Vancouver, etc., R.W. Co.*, 3 Can. Ry. Cases 108; and therefore a railway which has performed work and spent money upon the construction and operation of another's line without authority cannot recover for their value: *Great Western R.W. Co. v. Preston, etc., R.W. Co.*, 17 U.C.R. 477. And so a railway company which runs its trains over another's line without authority would not be entitled to the protection of the statute and would be liable at common law for all damages which it caused to others in the course of its unwarranted occupation and operation: *Welleans v. Canada Southern R.W. Co.*, 21 A.R. 297. Reversed upon the facts: *Michigan Central R.W. Co. v. Welleans*, 24 S.C.R. 309, and see the remarks of Earl Cairns in *Gardner v. London, etc., R.W. Co.*, L.R. 2 Ch., at p. 212 quoted, 2 Can. Ry. Cases 259.

Subject, however, to the limitations about to be mentioned a company which carries on the operations which are expressly authorized by its act of incorporation with due diligence and without negligence is not liable in an action for any damages which naturally flow from performance of the works which it is authorized to execute: *Canadian Pacific R.W. Co. v. Roy*, 1 Can. Ry. Cases 196, following *Geddes v. Bann Reservoir*, 3 A.C. 430, and *Hammersmith R.W. Co. v. Brand*, L.R. 4, H.L. 171, and the previous state of the common law imposing liability can-

not render inoperative the positive enactment of a statute: *Canadian Pacific R.W. Co. v. Roy, supra*. This view had been combatted in the Province of Quebec where it had been held that notwithstanding the powers conferred upon railways by the Railway Act, 51 Vict., cap. 29 (D.), a railway company was liable under the civil law in force in Quebec though they carried out the works authorized by statute without any negligence on their part. See 1 Can. Ry. Cases 170 and notes, 2 Can. Ry. Cases, pp. 303-305, but by the decision of the Privy Council, *supra*, the law laid down for the Province of Quebec is now the same as in the other Provinces and in England. Similarly a railway company to which the Act 51 Vict., c. 29, applied being authorized by law to carry cattle and as a necessary incident thereto to maintain pens for herding them are not liable if in the ordinary exercise of their powers they create a nuisance: *Bennett v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cases 451, following *London, etc., R.W. Co. v. Truman*, 11 A.C. 45; nor were they prior to the present Act (section 239, *infra*) liable for fires set out by their locomotives unless some negligence on their part could be shown: *Canadian Pacific R.W. Co. v. Roy, supra*, and cases cited in notes 1 Can. Ry. Cases 208, *et seq.*, but section 239, *infra*, has altered the law in this particular, though in other respects it is still the law in the case of railway companies that all injuries resulting from the proper operation of the company under their powers expressly or impliedly granted them by statute are deemed to be included in the compensation granted under the terms of the statute and must be recovered under its provisions nor can they be made the subject of an independent action: *Powell v. Toronto, etc., R.W. Co.*, 25 A.R. 209; *Hammersmith v. Brand*, L.R. 4, H.L. 171; *Brodeur v. Roxton Falls*, 11 R.L. 447; and if a contractor is building part of the line for the railway and necessarily causes damages he may claim the benefit of the statute: *Hendrie v. Onderdonk*, 34 C.L.J. 414. The following are additional instances of the application of this principle: Temporary inconvenience caused to land owners during construction: *Hendrie v. Onderdonk, supra*. Vibration caused by railway trains passing along an adjoining highway: *Powell v. Toronto, etc., R.W. Co., supra*; the laying of street railway tracks closer to one side of the street than the other: *Attorney-General v. Montreal Street R.W. Co.*, 1 L.N. 580; the escape of electricity from the tracks of a street railway company, causing injury to the operations of

a telephone company where that is a natural incident to operations legalized by statute: *Eastern, etc., R.W. Co. v. Cape Town Telephone Co.* (1902), A.C. 381; but the "power" to do a particular thing as, for instance, to construct a railway, does not justify the undertakers (to use a general word) in doing that thing so as to cause a nuisance unless by express language or necessary implication that is stated or must be inferred: *Shelfer v. City of London, etc., Co.* (1895), 1 Ch. 287, at p. 296; see *National Telephone Co. v. Baker* (1893), 2 Ch. 186; and so any company is always liable where fires were set by its locomotives and negligence or defective appliances could be proved: *Rainville v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cases 113, and other cases reported and cited, *ibid.* So also an interference with ancient lights or causing a subsidence of the soil is not expressly or impliedly authorized and damages therefor can be recovered: *Jordeson v. Sutton* (1899), 2 Ch. 217, and vibration caused by the operation of heavy machinery in a power house: *Hopkin v. Hamilton Electric Light Co.*, 2 O.L.R. 240, 4 O.L.R. 258; and the privileges conferred by its charter upon a street railway company for the construction and operation of its railway upon the public streets do not relieve it from damages to the owners of property adjoining its power house arising from smoke, noise, and vibration in so far as they depreciate the rental or selling value of the property: *Gareau v. Montreal Street R.W. Co.*, 2 Can. Ry. Cases 297; and a railway company has no right to allow smoke to escape for a longer time than is absolutely necessary: *South Eastern R.W. Co. v. London County Council*, 84 L.T. 632; and any careless oppressive or arbitrary exercise of its statutory powers will render the company liable to an action for damages: *Sutton v. Clarke*, 6 Taunton 34; *East Fremantle v. Annis* (1902), A.C. 213, and where work is carried on night and day to the discomfort of adjoining owners that being an admittedly unreasonable exercise of its powers it will be restrained: *Roberts v. Charing Cross, etc., R.W. Co.*, 87 L.T. 732, 19 T.L.R. 160. So also where work is entered upon before parliamentary powers are actually granted the company takes the risk of liability for all damages which may be caused thereby: *Ash v. Great Northern R.W. Co.*, 19 T.L.R. 639, and an escape of electricity due to a failure to exercise the high degree of care, skill and foresight required of per-

sons engaging in operations of a dangerous nature is actionable negligence notwithstanding the existence of a statute authorizing the use of electricity: *Royal Electric Co. v. Hevé*, 32 S.C.R. 426. There is said to be a distinction between the powers conferred upon the municipality and those conferred upon a railway company respectively to expropriate property, as the former exists for the public good and the latter is primarily a commercial enterprise and therefore it is said that their charters should be more rigidly construed: *Harding v. Township of Cardiff*, 29 Gr. 308.

The cases dealing with the various classes of powers conferred upon railways will be found referred to under other appropriate sections.

Powers
of the
company
in re-
spect of
the un-
dertaking

118. The company may for the purposes of the undertaking, subject to the provisions in this and the Special Act contained:—

For the purposes of the undertaking a company may exercise its statutory powers though the result may be to deprive the owners of property of a mine which is upon their lands, but if it could be shown that the company were acquiring the land not for the purposes for which the powers were given, but for some collateral object as, for instance, to sell at a profit, the exercise of its powers for such a purpose would be restrained: *Jenkins v. Central Ontario R.W. Co.*, 4 O.R. 593. And the court may always control the powers of a railway company when exercised for some colourable purpose: *Galloway v. London*, L.R. 1 H.L. 34; *Eversfield v. Midsussex R.W. Co.*, 3 De. G. & J. 286; *Dodd v. Salisbury R.W. Co.*, 5 Jur. N.S. 783; *Carington v. Wycombe R.W. Co.*, L.R. 3 Ch. 377. As was said by Lord Cairns in *Richmond v. North London R.W. Co.*, L.R. 3 Ch. at p. 681, "One of the best established objects of the jurisdiction of this court is to take care that companies exercising powers under their acts shall not exercise them otherwise than for the purpose of the act." This was quoted and followed in *Nihan v. St. Catharines, etc., R.W. Co.*, 16 O.R. 459, at p. 473. See also *Re Watson and Northern R.W. Co.*, 5 O.R. 550.

The term "undertaking" used in this paragraph is defined *ante*, sec. 2 (bb).

(a.) enter into and upon any Crown lands without previous license therefor, or into and upon the lands of any person whomsoever, lying in the intended route or line of the railway; and make surveys, examinations or other necessary arrangements on such lands for fixing the site of the railway, and set out and ascertain such parts of the lands as are necessary and proper for the railway: To enter upon lands.
Surveys.

Formerly 90(a). This section relates only to preliminary surveys and staking out of the land. Where a company desires to take, use or occupy Crown lands sections 134 to 136, *infra*, would govern, and a previous license to do so would have to be obtained; similarly where the company desires to occupy the lands of individuals sections 138 to 141, *infra*, would apply and necessary notices must be given and a warrant for immediate possession obtained if that is required.

(b.) receive, take and hold, all voluntary grants and donations of lands or other property or any bonus of money or debenture, or other benefit of any sort, made to it for the purpose of aiding in the construction, maintenance and accommodation of the railway: but the same shall be held and used for the purpose of such grants or donations only; Receive and grants bonuses.

Formerly 90(b). Where lands belonging to the Dominion of Canada are given by way of subsidy to a railway company that company takes the lands subject to all the conditions set out in the Dominion Lands Acts, so far as they can be made applicable to railways, whether those conditions appear in the patent to the company or not: *Calgary, etc., R.W. Co. v. The King*, 8 Exchequer 83, 33 S.C.R. 673.

Donations. "Mere donations are sometimes highly beneficial to the donors and frequently the construction of a line of railway will give value to estates which till then were almost valueless," Girouard, J.: *Quebec, etc., R.W. Co. v. Gibsone*, 29 S.C.R. 340, at p. 358. But where there is a covenant on the part of a railway company to locate its line through the lands conveyed that covenant in itself takes the grant out of the category of donations and makes it a conveyance for value, *ibid.* Where a grant of lands or payment of a bonus is made to a rail-

way company in consideration of covenants by the latter to undertake certain works or operate or maintain its line in a specific manner, difficult questions arise as to how far such covenants can be afterwards enforced against the company. See this subject discussed in 1 Can. Ry. Cases, pp. 289 to 297, where a number of Canadian decisions are quoted.

Acquire property.	(c.) purchase, take and hold of and from any person, any lands or other property necessary for the construction, main-
Dispose of property not required.	tenance and operation of the railway, and also alienate, sell or dispose of, any lands or property of the company which for any reason have become not necessary for the purposes of the railway;

Carry railway across lands.	(d.) make, carry or place the railway across or upon the lands of any person on the located line of the railway: 63-64 V., c. 23, s. 3.
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Formerly section 90 (c) amended. Compare 8 Vict., cap. 18, sec. 6 (Imp.). See also notes to secs. 122 to 174, *infra*.

When lands have been acquired for the purposes of the company they become impressed with a trust in favor of the public and can be used only for railway purposes unless they afterwards, for any reason, fall within the description of "superfluous lands" as they are known in England (8 Vict., cap. 18, sec. 127 (Imp.)), when under the provisions of the latter part of this sub-section they may be sold or disposed of: *Vallicar v. Grand Trunk R.W. Co.*, 2 Can. Ry. Cas. 245, 3 Can. Ry. Cas. 399, but without such express powers a railway company cannot sell or alienate its lands: *Mulliner v. Midland R.W. Co.*, 11 Ch. D. 611; *Pratt v. Grand Trunk R.W. Co.*, 8 O.R. 499; and generally it is for the railway company, when its good faith is not attacked, to determine whether lands owned by it are superfluous or not, but this rule does not apply where an execution creditor is trying to realize an execution against the company's lands not required for the purposes of its railway: *Erie, etc., R.W. Co. v. Great Western R.W. Co.*, 19 Gr. 43; and a railway company has no greater power to grant an easement in the nature of a farm crossing or a right of way over, or the right to lay a sewer under its premises than it has to convey the lands themselves: *Guthrie v. Canadian*

Pacific R.W. Co., 1 Can. Ry Cases 1; *Canadian Pacific R.W. Co. v. Guthrie*, 1 Can. Ry. Cases 9; *Valliear v. Grand Trunk R.W. Co.*, *supra*; *Canada Southern R.W. Co. v. Niagara Falls*, 22 O.R. 41. And the same cases show that where the right to an easement depends upon the presumption of a lost grant no such easement can be acquired over railway lands which are in use for the general purposes of the company. See also *Great Western R.W. Co. v. Talbot* (1902), 2 Ch. 759.

The question whether lands have become "superfluous" within the meaning of the English Act cited above is a question of mixed law and fact to be determined upon each case as it arises: *Macfie v. Callander, etc., R.W. Co.* (1898), A.C. 270. For other English decisions upon this subject see Browne & Theobald 3rd Edition, pp. 234 to 236.

(e.) cross any railway, or join the railway with any other railway at any point on its route, and upon the lands of such other railway, with the necessary conveniences for the purposes of such connection; Cross and connect with other railways.

Formerly section 90 (f). See sections 137, 177 and 178, *infra*, and notes.

(f.) make complete, operate, alter and maintain the railway with one or more sets of rails or tracks, to be worked by the force and power of steam, electricity, or of the atmosphere, or by mechanical power, or any combination of them; Construct and operate railways.

Formerly section 90 (k). Compare 8 Vict., cap 20, sec. 60, (Imp.). Motive power.

The word "operate" in line one has been added and the word "maintain" substituted for "keep in repair." The former section also had the words "of animals" after "atmosphere" in line 3.

(g.) construct, erect and maintain all necessary and convenient roads, buildings, stations, depots, wharfs, docks, elevators, and other structures, and construct, purchase and acquire stationary or locomotive engines, rolling stock, and other apparatus necessary for the accommodation and use of the traffic and business of the railway; Construct buildings, equipment, etc.

Formerly section 90 (1) amended. Compare 8 Vict., cap. 20, sec. 16 & 86 (Imp.). The present section has been altered by the insertion of the words "roads," "docks," "elevators, and other structures," and the employment of the word "rolling stock" in place of the words "carriages, waggons, floats, and other machinery." The word "traffic" has been substituted for "passengers and freight." "Rolling stock" is defined by sec. 2 (t) and "traffic" by sec. 2 (z) *ante*.

For notes upon the erection of stations see sec. 204, *post*.

Construct branch railways. (h.) make branch railways, and manage the same, and for that purpose exercise all the powers, privileges and authority necessary therefor, in as full and ample a manner as for the railway;

Formerly section 90 (n.) amended. The former section read as follows "Make branch railways if required and provided for by this or the special act and manage," etc. By sections 121 and 122 of the former act there was power to make branch railways for the purposes therein mentioned and these sections now appear with various amendments as sections 175 and 176. The cases upon this subject will be found in the notes to those sections. For the English provisions upon this subject, compare 5 and 6 Vict., cap. 55, sec. 12, and 8 Vict., cap. 20, sec. 76. The latter empowering the owners of land adjoining the railway to make branch lines to it.

Transport passengers and freight. (i.) take, transport, carry and convey persons and goods on the railway, regulate the time and manner in which the same shall be transported, and the tolls to be charged therefor;

Formerly section 90 (b.). Compare 8 Vict., cap. 20, sec. 86 (Imp.). The differences between this and the former section are not important. The conditions under which passengers and goods are to be carried are laid down in sections 211 to 231, *infra*, and the provisions as to tolls in sections 251 to 280. "Toll" is defined by section 2 (x), *ante*.

Remove trees. (j.) fell or remove any trees which stand within one hundred feet from either side of the right of way of the railway, or which are liable to fall across any railway track;

Formerly 90 (c.). The damages which flow from the exercise of this right should be the subject of compensation and arbitration under the act. The owner has no right of action in the courts for the value of trees cut down: *Evans v. Atlantic, etc., R.W. Co.*, M.L.R. 6 S.C. 493, but the right to cut trees is distinct from the right to take land and if a company wishes to exercise such right they should serve a distinct notice and offer compensation therefor, and if no such notice is given, arbitrators in fixing damages for taking land cannot allow in addition damages for the possibility that the owner's trees may be cut down: *Re Ontario, etc., R.W. Co. v. Taylor*, 6 O.R. 338. Where trees are cut down by a railway company in exercise of this right the timber belongs to it; subject always to the liability to pay the true owner compensation therefor under the act; but if instead of proceeding under the expropriation clauses of the statute the owner sues the company for the damages, his action will be barred after one year under sec. 242, sub-sec. 1, *infra*: *McArthur v. Northern, etc., R.W. Co.*, 15 O.R. 733, 17 A.R. 86.

(k.) make or construct in, upon, across, under or over any railway, tramway, river, stream, watercourse, canal, or highway, which it intersects or touches, temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings and fences; Construct
embank-
ments,
bridges,
drains,
etc.

Formerly section 90 (g.). Compare 8 Vict., cap. 20, sec. 16 (Imp.). As to crossing railways and tramways see sub-section (e), *ante*, and sections 137, 177, and 178, *infra*; for crossing rivers, streams, watercourses or canals see sections 178 to 183, *infra*, for crossing highways, sections 184 to 191; for drainage works, sections 196 and 197; for fences, sections 199 to 201; bridges, tunnels and other structures, 202 and 203.

(l.) divert or alter, as well temporarily as permanently, the course of any such river, stream, watercourse or highway, or raise or sink the level thereof, in order the more conveniently to carry the same over, under or by the side of the railway; Divert
highways
and
water-
ways.

Formerly sec. 90 (h.). Compare 8 Vict., cap. 20, sec. 16 (Imp.). For cases in which a highway may be diverted see notes to sections 186, *infra*, or a water way sections 179, 196 and 197,

Construct drains. (m.) make drains or conduits into, through or under any lands adjoining the railway, for the purpose of conveying water from or to the railway;

Formerly sec. (i). Compare 8 Vict., cap. 20, sec. 16 (Imp.). See sec. 141, *infra*, for method of obtaining water required by the railway.

Divert drains, pipes, and wires. (n.) divert or alter the position of any water-pipe, gas-pipe, sewer or drain, or any telegraph, telephone or electric lines wires or poles;

Formerly sec. 90(j). The words "electric lines, wires or poles" were formerly "electric light, wire or pole." The meaning of "electric lines" in this connection does not seem to be quite clear. It would almost seem to confer power to divert or alter the position of an electric railway track.

Construct tele-graph, telephone and electric lines. (o.) construct, acquire and use telegraph, telephone or electric lines and plant;

Formerly sec. 90 (m) amended. The section formerly read "Construct or acquire electric, telegraph and telephone lines *for the purposes of its undertaking.*" The words in italics having been left out it might be argued that a railway is not now restricted in the construction of works of this character to cases where it is necessary for or cognate to the main object of its incorporation, but by section 192, *infra*, it is expressly provided that the company may construct and operate telegraph and telephone lines upon its railway *for the purposes of its undertaking*: so that in this sub-section the former limitation is preserved in effect. See also notes to sub-sec. (q), *infra*, and to sections 192 to 195.

Alter and substitute other works. (p.) from time to time alter, repair or discontinue the before-mentioned works or any of them, and substitute others in their stead;

Formerly sec. 90 (p). Compare 8 Vict., cap. 20, sec. 86 (Imp.).

The powers granted by this clause are not limited to the time granted by the special act or railway act for the construction of the railway, and so they may alter and repair old works, or substitute new works for them after the time limited for originally constructing those works has expired: *Elmsley v. North Eastern R.W. Co.* (1896), 1 Ch. 418. On the general subject of repairs see sections 208 to 210, *infra*.

(q.) do all other acts necessary for the construction, main-
tenance and operation of the railway. 51 V., c. 29, s. 90, Am. Do other
necessary
acts.

Formerly sec. 90 (q.). Compare 8 Vict., cap. 20, sec. 16 (Imp.). It has been held in England that a similar provision limited a railway company in the exercise of the powers granted by this section to cases in which the proposed works were actually necessary for the "construction, maintenance and operation" of the railway, and the mere fact that works not in terms authorized might save expense to the company is no ground for allowing the latter to execute them and so a railway which had no express power to divert a highway was not allowed to do so on the ground that that course was much cheaper than running their line above or below it: *Queen v. Wycombe R.W. Co.*, L.R. 2 Q.B. 310, see pp. 320 and 325; nor was a railway company allowed to build a mortar mill on their land, thereby causing a nuisance though thereby they could execute their works more economically: *Fenwick v. East London R.W. Co.*, 20 Eq. 544, at p. 549 and 551. This case was explained in *Harison v. Southwark, etc., Co.* (1891), 2 Ch. 409, and it and *Queen v. Wycombe R.W. Co.*, *supra*, were followed with reluctance by Fry, J., in *Pugh v. Golden Valley R.W. Co.*, 12 Ch. D. 274, 15 Ch. D. 330, quoting Jessel, M.R., in *Fenwick v. East London R.W. Co.* *ibid.* at p. 551, as follows: "I think the case is concluded by the authorities (I should have thought it would have been by good sense without authority) that you cannot damage your neighbor's property merely for the purpose of saving yourself a little money where it is unnecessary for the construction of the railway;" but whether works are "necessary for the construction" of the railway or not is not a question for the land owner to decide, and so where a company in order to prevent access to the plaintiff's land being completely blocked took land of theirs against their will for the purpose of diverting a highway

thereby diminishing the obstruction, it was held that the company was entitled to do so: *Dowling v. Pontypool, etc., R.W. Co.*, 18 Eq. 714.

Declara-
tion as to
powers
with
respect
to lands.

2. Any company which has obtained from the Crown by way of subsidy or otherwise, in respect of the construction or operation of its railway, a right to any land or to an interest in land, has, and from the time of obtaining such right has had, as incident to the exercise of its corporate powers, authority to acquire, sell or otherwise dispose thereof or any part thereof; and such company may convey the same, or any part thereof, to any other company which has entered into any undertaking for the construction or operation, in whole, or in part, of the railway in respect of which such land or interest in land was given; and thereafter such other company shall have, in respect of such land or interest in land, the same authority as that of the company which has so conveyed it; and as to any lands given to the company by any corporation or other party, as aid towards, or as consideration in whole or in part for, the construction or operation of the company's railway, either generally or with respect to the adoption of any particular route, or on any other account, the authority of the company and of any other company to which it may convey its right in any of the said lands shall be the same as if such lands had been obtained by the company from the Crown as aforesaid. 55-56 V., c. 27, s. 3.

The first thirteen lines of this sub-section were enacted as sec. 90 (s) of 51 Vict., cap. 29, by 53 Vict., cap. 23, sec. 1, and the rest was added by 55 and 56 Vict., cap. 27, sec. 3, from which the present sub-section is taken. The first part empowers a company who has received Crown lands by way of subsidy or otherwise to convey them to any other company who may have arranged for the construction of the former's line while the latter part conferred a similar power in any case in which lands have been given to a company by "any corporation or other party." The section is declaratory in form and apparently retrospective, the wording being "any company * * * has and

from the time of obtaining such right has had," etc. In *Re Quebec & Atlantic, etc., R.W. Co.*, Q.R. 8 Q.B. 42, it was held independently of any statute that a railway company having obtained subsidies has the right to transfer the same to any other railway company which requires its franchises; but such assignment would no doubt be subject to all conditions express or implied upon which the lands were originally granted: *Re Calgary, etc., R.W. Co. v. The King*, 8 Ex. C.R. 83, 33 S.C.R. 673.

119. The company shall restore, as nearly as possible, to Company its former state, any river, stream, watercourse, highway, water-^{to re-} pipe, gas-pipe, sewer or drain, or any telegraph, telephone or ^{store, as} electric lines, wire or pole, which it diverts or alters, or it shall ^{far as} put the same in such a state as not materially to impair its use-^{possible,} ^{works} ^{diverted.} fulness. 51 V., c. 29, s. 91, Am.

The only difference between this and the former section is the substitution of "lines" for "light" before "wire" in the fourth line. Compare 7 Vict., cap. 20, secs. 18, 20 and 21.

120. The company shall, in the exercise of the powers by this or the Special Act granted, do as little damage as possible, ^{Compensation for} and shall make full compensation, in the manner herein and ^{damage.} in the Special Act provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers. 51 V., c. 29, s. 92.

This section was first introduced into the Railway Act of 1888, as section 92, and according to the view of the late Chief Justice Armour in *Re Birely and Toronto, etc., R.W. Co.*, 28 O.R. 468, its introduction had an important bearing upon the liability of railway companies to pay compensation under the act for damages to property caused by the exercise of their powers. The rules upon which compensation for lands taken and lands injuriously affected should be based had been the subject of much discussion, both in England and Canada for many years, and while the wording of English and Canadian statutes was different the rules adopted prior to this enactment in 1888 were substantially the same. Without now discussing them in full

the statement of their effect about to be given is submitted as being substantially accurate. The rules submitted are as follows:—

1. Unless it clearly appears that a legislature intended to take away property without paying or requiring the payment of compensation, such an intention will not be inferred: *Commissioner of Public Works v. Logan* (1903) A.C. 355, following *Western Counties R.W. Co. v. Windsor, etc., R.W. Co.*, 7 A.C. 178; *Re McDowell & Palmerston*, 22 O.R. 563.

2. The value of the lands taken must, of course, be paid for, the rule being to ascertain the value of the land of which the part so expropriated is a portion before the taking and the value of the same land after the taking and deduct one from the other, the difference being the amount to be allowed for compensation: *James v. Ontario, etc., R.W. Co.*, 12 O.R. 624, 15 A.R. 1, following *Re Ontario, etc., R.W. Co. and Taylor*, 6 O.R. 338.

3. "The value of the land is to be assessed on the principle of compensation to the owner. The question is not what the persons who take the land will gain by taking it but what the person from whom it is taken will lose by having it taken from him:" *per Lush, J., Stebbing v. Metropolitan Board of Works*, L.R. 6 Q.B. 37, at p. 45.

4. Whether lands have been taken or not the company must pay to the owner compensation for all injuries which the rest of the lands suffer through the construction of its works as distinguished from their subsequent operation or as it is frequently put, they must pay damages for all lands "injuriously affected by their construction:" *Parkdale v. West*, 12 A.C. 602; *Pion v. North Shore R.W. Co.*, 9 L.N. 218, 12 Q.L.R. 205, 14 S.C.R. 677, 14 A.C. 612.

5. Where any part of a land owner's property is taken the company must not only compensate him for the value of the lands so taken and for the damage to the rest of his lands which have been or may be injuriously affected by the construction of the railway, but they must also pay compensation for damages done or to be done to the remainder of the land by the operation of the railway as well as, for instance, for possible depreciation in value owing to vibration, smoke, and noise from passing trains: *Buccleuch v. Metropolitan*, L.R. 5 H.L. 418;

Essex v. Local Board of Acton, 14 A.C. 153; *Wood v. Atlantic, etc., R.W. Co.*, Q.R. 2 Q.B. 335, (1895), A.C. 257.

6. Where no part of a person's land is taken there is no right to compensation for injuries to adjoining property from the operation as distinguished from the construction of the railway: *Hammersmith v. Brand*, L.R. 4 H.L. 171; *Glasgow, etc., R.W. Co. v. Hunter*, L.R. 2 H.L. Sc. 78; *Re Medler & Toronto*, 4 Can. Ry. Cas. 13 and notes.

This being in substance the law in England and in Canada prior to the statute of 1888, section 92 of the act of 1888 corresponding with section 120 of the present act was introduced and from the fact that it was general in its terms and followed a clause conferring powers of operation as well as expropriation and construction, Armour, C.J., decided that the sixth rule stated above was reversed and that compensation must now be allowed for injuries arising from the operation of the railway even though no lands had been taken: *Re Birely and Toronto, etc., R.W. Co.*, 28 O.R. 468, in which an appeal was quashed, 25 A.R. 28; but the point was again brought up in *Powell v. Toronto, etc., R.W. Co.*, 25 A.R. 209, where the *Birely* case was referred to and it was held that notwithstanding the introduction of section 92 no compensation could be allowed to the owner of land fronting on a street along which a railway had been constructed, for damages from the operation of the railway; as compensation for lands injuriously affected must be based on injury or damage to the land itself and not on personal inconvenience or discomfort to the owner or occupant. Though not in terms overruled the judges of the Court of Appeal did not follow it nor adopt the rule of construction laid down by Armour, C.J., in his judgment. Up to the present therefore it may perhaps be safely stated that the above six rules still prevail though the matter may yet become the subject of further consideration in the Supreme Court and Privy Council. The subject of compensation under the Government Railways Act, R.S.C., cap. 39, sec. 3 (e), which is different in its terms, has been fully considered in *Vézina v. The Queen*, 17 S.C.R. 1. The subject is further dealt with under sections 138, *et. seq.*, but the following recent cases may be usefully consulted: *Huot v. Quebec, etc., R.W. Co.*, Q.R. 10 S.C. 373; *Queen v. Robinson*, 4 Ex. C.R. 430; 25 S.C.R. 692; *Manchester, etc., R.W. Co. v. Anderson* (1898),

2 Ch. 394; *Dickson v. Chateauguay, etc., R.W. Co.*, Q.R. 17 S.C. 170; *Chateauguay, etc., R.W. Co. v. Trenholme*, Q.R. 11 Q.B. 45; *The King v. Sedger*, 7 Ex. C.R. 274; *McQuade v. The King*, *ibid.* 318; *Todd v. Meaford*, 6 O.L.R. 469; *Re Medler & Toronto*, 4 Can. Ry. Cas. 13; *Re McDonald v. Toronto, etc., R.W. Co.*, 2 O.W.R. 723; *Re McQuesten v. Toronto, etc., R.W. Co.*, *ibid.* 721.

Powers
may be
exercised
in U.S.

121. Any company operating a railway from any point in Canada to any point on the international boundary line may exercise, beyond such boundary, the powers which it may exercise in Canada, in so far as they are permitted by the laws in force there. 53 V., c. 28, s. 1, part.

In *Macdonald v. Grand Trunk R.W. Co.*, 31 O.R. 663, at p. 665, Meredith, C.J., said, "The railway act is in my opinion not applicable to a railway situate in a foreign country, though operated by a company incorporated by or under the authority of the Parliament of Canada" and, accordingly, in that case he held that the restrictions imposed upon contracts under what is now sec. 214 (3), *infra*, did not apply to contracts which were being performed by or to the working of a railway in the United States.

Location of Line.

Map.

122. The company shall prepare a map showing the general location of the proposed line of the railway, the termini and the principal towns and places through which the railway is to pass, giving the names thereof, the railways, navigable streams and tide-water, if any, to be crossed by the railway, and such as may be within a radius of thirty miles of the proposed railway, and, generally, the physical features of the country through which the railway is to be constructed, and shall give such further or other information as the Minister may require.

Applica-
tion for
approval
of map.

2. Such map shall be submitted to the Minister in duplicate and prepared upon a scale of not less than six miles to the inch, or upon such other appropriate scale as the Minister may determine, and shall be accompanied by an application in duplicate.

stating the Special Act authorizing the construction of such railway and representing the Minister's approval of the general location as shown on the said map.

3. Before approving such map and location the Minister Approval. may, subject to the Special Act, make such changes and alterations therein as he may deem expedient, and upon being satisfied therewith shall signify his approval upon the map and the duplicate thereof, and when so approved, the map and application shall be filed in the Department of Railways and Canals and the duplicate thereof with the Board, and no change or alteration from the general location of the line of the railway, as approved by the Minister, shall be allowed, unless such change or alteration has been first approved by the Minister.

4. The foregoing provision of this section shall only apply Application of to the main line and to the branch lines over six miles in length. proceed- ings.

5. Upon compliance with the preceding provisions of this section the company shall make a plan, profile and book of Plan, pro- reference of the railway. The plan shall show the right of file and way, with lengths of sections in miles, the names of terminal book of points, the station grounds, the property lines, owners' names, reference. the areas and length and width of lands proposed to be taken, Plan. in figures, (every change of width being given), and the bearings, also all open drains, watercourses, highways and railways proposed to be crossed or affected. The profile shall Profile. show the grades, curves, highway and railway crossings, open drains and watercourses. The book of reference shall Book of describe the portion of land proposed to be taken in each lot to reference. be traversed, giving numbers of the lots, and the area, length and width of the portion thereof proposed to be taken, and names of owners and occupiers so far as they can be ascertained. The Board may require any additional information for the proper understanding of the plan and profile.

May be a section of railway. 6. The plan, profile and book of reference may be of a section or sections of the railway.

7. In the province of Quebec the portion of the railway comprised in each municipality shall be indicated on the plan and in the book of reference by separate number or numbers, 63-64 V., c. 23, s. 6, part, Am.

The 1st, 2nd, 3rd and 4th sub-sections, providing for a preliminary map showing the general location of the line, are new and are additions to the corresponding sections 123 and 124 of the Act of 1888, as amended by 63 & 64 Vict., cap. 23, sec. 6.

The 5th sub-section corresponds to former section 123 and is much more minute and specific in its requirements. The expression "property lines" means the dividing or boundary lines between the lands of adjoining owners.

There is no provision in this Act for any change in location without the approval of the Board under section 130, the former section 117 having been omitted.

Under the Act of 1888 the duties of the Minister or his Deputy, section 125, in examining and certifying the plan, etc., were ministerial. Under this section the Minister may make changes and alterations in the location map as he may deem expedient.

Sanction by Board. 123. Such plan, profile and book of reference shall be submitted to the Board, who, if satisfied therewith, may sanction the same, and by such sanction shall be deemed to have approved merely the location of the railway and the grades and curves thereof, as shown in such plan, profile and book of reference, but not to have relieved the company from otherwise complying with this Act. 63-64 V., c. 23, s. 6, part, Am.

Board may require plan, etc., of whole railway. 2. Before sanctioning any plan, profile or book of reference of a section of the railway, the Board may require the company to submit the plan, profile and book of reference of the whole, or any portion, of the remainder of the railway or such further or other information as the Board may deem expedient. 63-64 V., c. 23, s. 6, part, Am.

By this section the Board is substituted for the Minister, whose sanction is required, but such sanction is not to be taken as compliance by the company with the requirements of the other sections of the Act, *e.g.*, in the case of crossing highways: sections 184, 186.

124. The plan, profile and book of reference, when so sanctioned, shall be deposited with the Board, and each plan shall be numbered consecutively in order of deposit, the company shall also deposit copies thereof, or of such parts thereof as relate to each district or county through which the railway is to pass, duly certified as copies by the Secretary, in the offices of the registrars of deeds for such districts or counties respectively. 63-64 V., c. 23, s. 6, part, Am. Deposit of plans, etc., and copies.

The date at which the compensation or damages for land taken is ascertained is fixed by the deposit of the plan, profile and book of reference. Section 153.

James v. Ontario & Quebec R.W. Co. (1887), 15 A.R. 1.

125. The railway may be made, carried or placed across or upon the lands of any person on the located line, although the name of such person has not been entered in the book of reference, through error or any other cause, or although some other person is erroneously mentioned as the owner of or entitled to convey, or as interested in such lands. 63-64 V., c. 23, s. 5. Certain errors in documents filed not to affect construction.

The words in section 118 (Act of 1888) "or within the distance from said line as aforesaid" were struck out by 63-64 V., c. 23, s. 5.

There appears now to be no power to make a lateral deviation not exceeding one mile, the relevant provision in sec. 90 (*d*) and sec. 117 in the Act of 1888 having been repealed. Approval by the Board of any deviation is required by sec. 130.

126. Where any omission, misstatement or error is made in any plan, profile or book of reference so registered, the company may apply to the Board for a certificate to correct the same. The Board may, in its discretion, require notice to be given to parties Errors in plan, etc., how corrected. Notice.

Certificate. interested, and, if it appears to the Board that such omission, misstatement or error arose from mistake, may grant a certificate setting forth the nature of the omission, misstatement or error and the correction allowed.

When corrected. 2. Upon the deposit of such certificate with the Board, and of copies thereof, certified as such by the Secretary, with the registrars of deeds of the districts or counties, respectively, in which such lands are situate, the plan, profile or book of reference shall be taken to be corrected in accordance therewith, and the company may, thereupon, subject to this Act, construct the railway in accordance with such correction.

Powers of two justices. 3. Two justices may exercise the powers of the Board under this section. 51 V., c. 29, s. 128; 63-64 V., c. 23, s. 7, Am.

The power given to the Board is new.

Duties of registrars with respect to plans, etc. 127. Every registrar of deeds shall receive, and preserve in his office, all plans, profiles, books of reference, certified copies thereof, and other documents, required by this Act to be deposited with him, and shall endorse thereon the day, hour and minute when the same were so deposited, and all persons may

Extracts and copies. resort to the same, and may make extracts therefrom, and copies thereof, as occasion requires, paying the registrar therefor at the rate of ten cents for each hundred words, so copied or ex-

Fees. tracted, and ten cents for each copy made of any plan or profile.

Certified copies. The registrar shall, at the request of any person, certify copies of any such plan, profile, book of reference, or document, so deposited in his office, or of such portions thereof as may be required, on being paid therefor at the rate of ten cents for each hundred words copied, and such additional sum, for any copy of plan or profile furnished by him, as is reasonable and customary in like cases, together with fifty cents for each certificate given by him. For any breach of the duties by this section imposed upon

Fees. such registrar, he shall be liable on summary conviction to a penalty of ten dollars, and also to an action for damages at the suit of any person injured by such breach.

Penalty for breach of duty.

2. Such certificate of the registrar shall set forth that the plan, profile or document, a copy of which, or of any portion of which, is certified by him, is deposited in his office, and state the time when it was so deposited, and that he has carefully compared the copy certified with the document on file, and that the same is a true copy of such original. And such certified copy shall in all courts be evidence that such original document was so deposited at the time stated and certified, and shall be *prima facie* proof of the original so deposited, and that the same was signed, certified, attested, or otherwise executed by the persons, by whom, and in the manner in which, the same purports to be signed, certified, attested or executed, as shown or appearing by such certified copy, and in the case of a plan, that such plan is prepared according to a scale, and in manner and form, sanctioned by the Board. 51 V., c. 29, ss. 132 and 133, Am.

What certificate of registrar must state.

Evidence.

128. A plan and profile of the completed railway or of so much thereof as is completed and in operation, and of the land taken or obtained for the use thereof, shall, within six months after completion of the undertaking, or within such extended or renewal period as the Board at any time directs, be made and filed with the Board, and plans of the parts thereof, located in different districts and counties, prepared on such a scale, and in such manner and form, and signed, or authenticated in such manner, as the Board may from time to time, by general regulation or in any individual case, sanction or require, shall be filed in the registry offices for the districts and counties in which such parts are respectively situate; and every company which fails or neglects to file such plans and profiles with the Board, or to file such plans in such registry offices, within the said period, shall incur a penalty of two hundred dollars, and a like penalty for each and every month during which such failure or neglect continues. 51 V., c. 29, s. 134, Am.; 62-63 V., c. 37, s. 2, Am.

Plan and profile of completed line must be filed.

Penalty for neglect.

129. All plans and profiles required by law to be deposited by the company with the Board, shall be drawn to such scale, with such detail, upon such materials, and of such character, as

General provisions respecting plans, etc.

Must be signed.

Board may refuse unsatisfactory plans.

Further plans as Board requires.

the Board may, either by general regulation, or, in any case require or sanction, and shall be certified and signed by the president or vice-president or general manager and also by the engineer of the company; and any book of reference, required to be so deposited, shall be prepared to the satisfaction of the Board. Unless and until such plan, profile and book of reference is so made satisfactory to the Board, the Board may refuse to sanction the same, or to allow the same to be deposited with the Board within the meaning of this Act.

2. In addition to such plans, profiles and books of reference, the company shall, with all reasonable expedition, prepare and deposit with the Board, any other, or further plans, profiles, or books of reference of any portion of the railway, or of any siding, station or works thereof, which the Board may from time to time order or require. Sub. for 51 V., c. 29, s. 135.

This section, substituted for sec. 135 (Act of 1888), is more ample in its provisions. The former section simply gave the right to the Minister to prescribe the seale and the style of paper to be used in making the plans. The Board now has power to refuse to sanction the plan, profile and book of reference until these are made satisfactory to the Board.

Sub-sec. 2, providing that further plans, profiles and books of reference of a portion of the railway may be required by the Board, is also new. Until the requirements of the Board are satisfied, the construction of the railway cannot proceed. Sec. 131.

Deviations, changes or alterations.

130. If any deviation, change or alteration is required by the company to be made in the railway, or any portion thereof, as already constructed, or as merely located and sanctioned, as aforesaid, a plan, profile and book of reference of the portion of such railway proposed to be changed, showing the deviation, change or alteration proposed to be made, shall, in like manner as provided in section one hundred and twenty-three, be submitted for the approval of, and may be sanctioned by the Board; and the same, when so sanctioned, shall be deposited and dealt

with as provided in sec. 124, and the company may thereupon make such deviation, change, or alteration, and all the provisions of this Act shall apply to the portion of such line of railway so at any time changed or proposed to be changed as to the original line.

2. The Board may either by general regulation, or in any particular case, exempt the company from submitting the plan, profile and book of reference, as in this section provided, where such deviation, change, or alteration, is made, or to be made, for the purpose of lessening a curve, reducing a gradient, or otherwise benefiting the railway, or for any other purpose of public advantage, as may seem to the Board expedient, provided such deviation, change, or alteration shall not exceed three hundred feet from the centre line of the railway, located, or constructed, in accordance with the plans, profiles and books of reference deposited with the Board under this Act; but nothing in this section shall be taken to authorize any extension of the railway beyond the termini mentioned in the Special Act. 51 V., c. 29, s. 120: 63-64 V., c. 23, s. 8, part, Am.

When
devia-
tions
allowed.

No exten-
sion
allowed
beyond
termini
men-
tioned in
Special
Act.

The effect of this section and the changes made by this Act in repealing sub-section (d) of sec. 90, secs. 117 and 118 (Act of 1888), is to deprive the company of any right to deviate in constructing its line from the located line except under the provisions of this section with the approval of the Board.

Brooke v. Toronto Belt Line R. W. Co., 21 O. R. 401.

The compulsory power of expropriation ceases upon the completion of the railway.

Kingston & Pembroke R.W. Co. v. Murphy, 17 S.C.R. 582.

131. The company shall not commence the construction of the railway, or any section or portion thereof, until the provisions of secs. 123 and 124 are fully complied with; and shall not make any change, alteration or deviation in the railway, or any portion thereof, until the provisions of the last preceding section are fully complied with. 63-64 V., c. 23, ss. 4 and 8, part, Am.

Works
not to be
com-
menced
until
certain
pro-
visions
complied
with.

This and the preceding sections make it clear that the company is not entitled to proceed with the construction of the railway as originally located or with any proposed deviation until the provisions of secs. 123, 124 and 130 are fully complied with.

Mines and Minerals.

Mines to
be pro-
tected.

132. No company shall, without the authority of the Board, locate the line of its proposed railway, nor construct the same or any portion thereof, so as to obstruct or interfere with, or injuriously affect the working of, or the access or adit to any mine then open, or for opening which preparations are, at the time of such location, being lawfully and openly made. 51 V., c. 29, s. 119, Am.

Company
not en-
titled to
minerals,
etc., in
lands.

2. The company shall not be entitled to any mines, ores, metals, coal, slate, mineral oils or other minerals in or under any lands purchased by it, or taken by it under any compulsory powers given it by this Act, except only such parts thereof as are necessary to be dug, carried away or used in the construction of the works, unless the same have been expressly purchased; and all such mines and minerals, except as aforesaid, shall be deemed to be excepted from the conveyance of such lands, unless they have been expressly named therein and conveyed thereby.

Excep-
tions.

The main section corresponds to sec. 119 (Act of 1888), the principal change being the insertion of the words "nor construct the same nor any portion thereof" in the second and third lines.

Sub-sec. 2 is new and is taken largely from sec. 77 of the English Railway Clauses Act of 1845.

"A reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning."

Hext v. Gill, L. R. 7, Chy. App. 699, at p. 712.

Midland Ry. v. Checkley, L. R. 4, Eq. 19.

Mines in this section includes minerals whether got by underground or open working: *Midland v. Haunchwood Brick & Tile Co.*, L.R. 20, Chy. Div. 552; and therefore a bed of clay, on which the railway had been made, was a mine excepted out of the conveyance of the land to the railway company, and might be dug, unless the company were willing to make compensation to the landowner.

Earl of Jersey v. Neath Union, L.R. 22 Q.B.D. 555.

Ruabon Brick & Terra Cotta Co. v. G. W. R.W. Co. (1893), 1 Chy. 427.

So also is limestone.

Midland R. W. Co. v. Robinson, 15 A. C. 19, but under similar words in the English Waterworks Clauses Act (1847) it was held that clay was not included under the term "minerals."

Notwithstanding the provisions of this section the company have the right to give notice to expropriate the minerals under the land as well as the surface lands upon its located line. Upon payment of the compensation the minerals would be "expressly purchased" within the meaning of this sub-section, the words are not to be confined to "purchased by agreement;" this provision is for the benefit, not of the mine owner, but of the company and only exempts the company from the obligation of buying the minerals together with the surface lands.

Errington v. Metropolitan District R. W. Co., L. R. 19, Chy. Div. 559.

Great Western R. W. Co. v. Bennett, L. R. 2, H. L. 27.

There is no provision in this Act corresponding to sec. 78 of the English Railway Clauses Act (1845). Sec. 133 is probably intended to take the place of the provisions of secs. 76 to 85 inclusive of the English Act, leaving such matters to be dealt with by the Board.

133. No owner, lessee or occupier of any such mines or minerals lying under the railway or any of the works connected therewith, or within forty yards therefrom, shall work the same until leave therefor has been first obtained from the Board.

Mining under or within 40 yards of any railway.

2. Upon any application to the Board for leave to work any such mine or minerals, the applicant shall submit a plan and profile of the portion of the railway to be affected thereby, and of the

Application for leave of Board.

mining works or plant proposed to be constructed or operated, affecting the railway, giving all reasonable and necessary information and details as to the extent and character of the same.

Protection and safety of the public.

3. The Board may grant such application upon such terms and conditions, as to protection and safety of the public, as to the Board seem expedient, and may order that such other works be executed, or measures taken, as under the circumstances appear to the Board best adapted to remove or diminish the danger arising, or likely to arise, from such mining operations.

This is a new section, introduced in consequence of the introduction of sec. 132. The Act of 1888 did not contain any exception of the mines and minerals from lands taken under the Act, consequently mines and minerals under the railway passed to the company in case of land compulsorily taken, and compensation had to be made therefor. There seems to be an omission from this section of any provision for a case where, on account of the working of the mine being dangerous, the Board should refuse to grant leave to work it upon any terms.

If the Board have such power, is there any way in which the owner can obtain compensation for his inability to work his mine in consequence of the existence of the railway, unless it should be held that this was damage to a party interested within the provisions of sec. 120? By that section the compensation must be made in the manner "herein and in the Special Act provided."

In *re* an arbitration between Lord Gerrard and L. & N. W. R. W. Co., (1895), 1 Q. B., 459, is a decision upon the principles of compensation applicable under the analogous secs. 77 to 85, of the English Railway Clauses Act, 1845.

A mine-owner working mines outside the forty-yard limit would appear to be liable if the railway is thereby deprived of support and injured; the special provisions of the Act not excluding the company from the common law right existing in the purchaser of the surface, to adjacent support from the vendor's land.

Elliott v. N. E. Ry., 10 H.L. Cas. 333.

G. W. Ry. Co. v. Cefn Cribbwr Brick Co., L.R. (1894), 2 Ch. 157.

Knowles v. L. & Y. Ry. Co., 14 A. C. 248.

L. & N. Ry. Co. v. Evans, (1893), 1 Ch. 16.

See as to evidence as to value of mineral.

Brown v. Commission for Railways, (1890), 15 A.C. 240.

The claimant is not obliged to prove by costly tests or experiments the mineral contents of his land.

Queen v. McCurdy, 2 Can. Ex. C.R. 311.

Taking or Using Lands.

134. No company shall take possession of, use or occupy any ^{Crown} lands vested in the Crown, without the consent of Governor in ^{lands.} Council; but with such consent, any such company may, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, but not alienate, ^{May not} so much of the lands of the Crown lying on the route of the rail- ^{alienate.} way as have not been granted or sold, and as is necessary for such railway, as also so much of the public beach, or of land so vested covered with the waters of any lake, river or stream, or of their respective beds, as is necessary for making and completing and using its said railway and works; and whenever any such ^{Lands} lands are vested in the Crown for any special purpose, or sub- ^{held by} ^{Crown in} ^{trust.} ject to any trust, the compensation money which the company pays therefor shall be held or applied by the Governor in Council for the like purpose or trust. 51 V., c. 29, s. 99, Am.

2. The extent of the public beach, or of the land covered ^{Public} with the waters of any river or lake in Canada, taken for the ^{beach} railway, shall not exceed the quantity hereinafter limited in the ^{and lands} case of lands which may be taken without the consent of the ^{covered} ^{with} ^{water.} owner. 51 V., c. 29, s. 105, Am.

Sub-sec. 2 of this section corresponds with sec. 105 (Act of 1888), with the addition of the words at the end thereof, "without the consent of the owner."

Vancouver v. Canadian Pacific R. W. Co., 23 S. C. R., 1, was decided upon somewhat analogous provisions in the Act of Incorporation of the Canadian Pacific Railway Company, 44 V., c. 1. s. 18.

As the consent of the Governor in Council is required to the taking of any land referred to in this section, not many questions are likely to arise.

For the construction placed upon the former statutes, 14 and 15 V., c. 51; 16 V., c. 169, s. 8, etc.

See *Booth v. McIntyre*, 31 C. P. 183.

See cases cited under sec. 161 *re* compensation.

Naval
or mili-
tary
lands.

135. Whenever it is necessary for the company to occupy any part of the lands belonging to the Crown reserved for naval or military purposes, it shall first apply for and obtain the license and consent of the Crown, under the hand and seal of the Governor General, and having obtained such license and consent, it may, at any time or times, enter into and enjoy any of the said lands for the purposes of the railway; but in the case of any such naval or military reserves, no such license or consent shall be given, except upon a report first made thereupon by the naval or military authorities in which such lands are for the time being vested, approving of such license and consent being so given. 51 V., c. 29, s. 100, Am.

In *Grand Trunk R. W. Co. v. Credit Valley R. W. Co.*, 27 Gr. 232, the circumstances under which the Northern Railway Company obtained an absolute title to certain ordnance lands in the City of Toronto, with the consent of the Crown, are discussed.

Indian
lands.

136. No company shall take possession of, or occupy, any portion of any Indian reserve or lands, without the consent of the Governor in Council; and when, with such consent, any portion of any such reserve or lands is taken possession of, used or occupied by any company, or when the same is injuriously affected by the construction of any railway, compensation shall be made therefor as in the case of lands taken without the consent of the owner. 51 V., c. 29, s. 101, Am.

Corresponds to sec. 101, with the substitution in the concluding words of the section of the words "as in the case of lands taken without the consent of the owner," for the words "as in other cases."

137. The company may, for the purpose of obtaining a right of way over or through lands owned or occupied by any other railway company, and for obtaining the use of the tracks, stations or station grounds of another railway company, or for the purpose of constructing and operating its railway, take possession of, use or occupy any lands belonging to any other railway company, and use and enjoy such right of way, tracks, stations or station grounds, subject always to the approval of the Board first obtained, and to any order or direction which the Board may make in regard to the exercise, enjoyment or restriction of such powers or privileges.

2. Such approval may be given upon application and notice, and after hearing, the Board may make such order, give such directions, and impose such conditions or duties upon either party, as to it may appear just or desirable, having due regard for the public and all proper interests; and in case the parties fail to agree as to compensation the Board may, by order, fix the amount of compensation to be paid in respect of the powers and privileges so granted. 51 V., c. 29, s. 102, Am.

Corresponds to sec. 102 (Act of 1888), with very considerable alteration, the first amendment being to make clear that the section covers the case of a railway obtaining the use of the right-of-way, tracks, stations or station grounds of another company. The next amendment is to subject this right to any order or direction which the Board may make. The former section contained a provision that all the provisions of the law at the time applicable to the taking of lands and their valuation and the compensation therefor, and appeals from awards should apply to such lands.

Grand Trunk R.W. Co. v. Lindsay, Bobcaygeon & Pontypool R. W. Co., 3 O. W. R. 54.

This provision has been entirely omitted.

The Board now decides under sub-sec. 2 the conditions on which the right-of-way over lands of another company, or the use of its tracks, may be obtained, and the question of compensation.

Compare the similar provisions of sec. 177, sub-sec. 2, sub fin., in the case of the crossing of one railway by another and see *Canadian Pacific R. W. Co. v. Bay of Quinte R. W. Co.*, 3 O. W. R., 542 and 658, where under the special circumstances of the case, an order having been made by the Governor in Council for an immediate crossing, the Board allowed a crossing to be made before the amount of the compensation was ascertained or security given therefor.

Extent of
lands
which
may be
taken. **138.** The lands which may be taken without the consent of the owner:—

For
right of
way. For the right of way shall not exceed one hundred feet in breadth, except in places where the rail-level is, or is proposed to be, more than five feet above or below the surface of the adjacent lands, when such additional width may be taken as shall suffice to accommodate the slope and side ditches;

For
Stations,
etc. For stations, depots and yards, with the freight sheds, warehouses, wharfs, elevators and other structures for the accommodation of traffic incidental thereto, shall not exceed one mile in length by five hundred feet in breadth, including the width of the right of way. 51 V., c. 29, s. 103, Am.

The company has no power to exceed the limit provided by this section except under the provisions or sections 139-142; the land must be taken as a whole and not in detached parcels.

Stewart v. Ottawa & N.Y. R.W. Co., 30 O.R. 599.

The effect of taking land under this and the following sections is to vest the land in the company in fee simple, not merely an easement or right of way over it.

Anglin v. Nickle, 30 U.C.C.P. 72.

Great Western R.W. Co. v. Lutz, 32 U.C.C.P. 166.

As to exception of minerals, see section 132, *supra*.

After the land is taken and the railway is completed, the power of expropriation is exhausted and authority to acquire any additional land required for the railway must be obtained from the Board under the following section 139:

139. Should the company require, at any point on the railway, more ample space than it then possesses or may take under the preceding section, for the convenient accommodation of the public, or the traffic on its railway, or for protection against snowdrifts, it may apply to the Board for authority to take the same, for such purposes, without the consent of the owner.

Where more ample space required.

2. The company shall give ten days' notice of such application to the owner or possessor of such lands, and shall furnish copies of such notices, with affidavits of the service thereof, to the Board upon such application.

Procedure thereon. Notice.

3. The company, upon such application, shall also furnish to the Board, in duplicate,—

What application must include.

A plan, profile and book of reference of the portion of the railway affected, showing the additional lands required, and certified as provided in section 129 of this Act.

An application, in writing for authority to take such lands, signed and sworn to by any of the aforementioned officers, referring to the plan, profile and book of reference, specifying definitely and in detail the purposes for which each portion of the lands are required, and the necessity for the same, and showing that no other land suitable for such purposes can be acquired at such place on reasonable terms and with less injury to private rights.

4. After the time stated in the aforementioned notices, and the hearing of such parties interested as may appear, the Board may, in its discretion, and upon such terms and conditions as the Board deems expedient, authorize in writing the taking, for the said purposes, of the whole or any portion of the lands applied for. Such authority shall be executed in duplicate, one to be filed with the plan, profile, book of reference, application and notices with the Board, and the other, with the duplicate plan, profile, book of reference and application, to be delivered to the company.

Authority from Board.

Deposit With Board.

Deposit
with
registrar
of deeds.

5. Such duplicate authority, plan, profile, book of reference and application, or copies thereof certified as such by the Secretary, shall be deposited with the registrar of deeds of the districts or counties, respectively, in which such lands are situate.

Sections
of Act
to apply.

6. All the provisions of this Act applicable to the taking of lands for the right of way, or main line, of the railway without the consent of the owner of such lands, shall apply to the lands authorized to be taken under this section, excepting sections one hundred and twenty-three and one hundred and twenty-four. 51 V., c. 29, ss. 106 to 111, Am.

Excep-
tions.

This corresponds to sections 106 to 111 (Act of 1888) with very considerable amendments, among others, the making of the map and plan provided for by sections 123-124 is dispensed with. The map or plan is to be furnished in accordance with the provisions of section 129.

In *re* application by Grand Trunk R.W. Co. to expropriate lands for a new Union Station at Toronto, Killam, Chief Commissioner, held (February, 1905): (1) That the Board had no power under this section to authorize the expropriation of streets, but only authority to approve of a crossing, the deviation, etc., of a street under sections 184 and 186; (2) That the Board had power to order the company to do or refrain from doing anything in connection with the land to be taken, or to pay a sum of money either as a condition precedent or subsequent to obtaining authority for the taking of land under this section. In the same case the Board ordered the applicants to pay interest upon the compensation, when ascertained, for the lands taken, from the date when notice of application under this section was first given to the owners, departing from the provision in section 153. (*q, v*): see 41 Can. L.J. 288.

Use of
lands ad-
joining
right of
way
during
construc-
tion or
repair
of rail-
way.

140. The company, either for the purpose of constructing or repairing its railway, or for the purpose of carrying out the requirements of the Board, or in the exercise of the powers conferred upon it by the Board, may enter upon any land which is not more than six hundred feet distant from the centre of the located line of the railway, and may occupy the said land as long

as is necessary for the purposes aforesaid; and all the provisions of law at any time applicable to the taking of land by the company, and its valuation, and the compensation therefor, shall apply to the case of any land so required; but before entering upon any land for the purposes aforesaid, the company shall, in case the consent of the owner is not obtained, pay into the office of one of the superior courts for the province in which the land is situated, such sum, with interest thereon for six months, as is, after two clear days' notice to the owner of the land, or to the person empowered to convey the same, or interested therein, fixed by a judge of any one of such superior courts. Such deposit shall be retained to answer any compensation which may be awarded the person entitled thereto, and may upon order of a judge of such court, be paid out to such person in satisfaction *pro tanto* of such award; the surplus, if any, thereafter remaining shall by order of the judge, be repaid to the company, and any deficiency therein to satisfy such award shall be forthwith paid by the company to the person entitled to compensation under such award. 51 V., c. 29, s. 112, Am.

Deposit where consent of owner not obtained

Compensation.

Corresponds to section 112 (Act of 1888) with the substitution of the word "Board" for "Railway Committee." All that portion of the section beginning with the words "such deposit shall be retained" is added. The language of this section makes clear that the ascertainment of the amount of compensation and its payment into Court is a condition precedent to the exercise of this right.

141. Whenever stone, gravel, earth, sand, water or other material is required for the construction or maintenance or operation of the railway, or any part thereof, or whenever such materials or water, so required, are situate, or have been brought to a place, at a distance from the line of railway, and the company desires to lay down the necessary tracks, spurs or branch lines, water pipes or conduits, over or through any lands intervening between the railway and the land on which such materials or water are situate, or to which it has been brought, the com-

Obtaining materials or water for construction, etc.

Right of way thereto. Procedure.

pany may, if it cannot agree with the owner of the lands for the purchase thereof, cause a land surveyor, duly licensed to act in the province, or an engineer to make a plan and description of the property or right of way, and shall serve upon each of the owners or occupiers of the lands affected, a copy of such plan and description, or of so much thereof as relates to the lands owned or occupied by them respectively, duly certified by such surveyor or engineer, and all the provisions of this Act, except section 123, shall apply, and the powers thereby granted may be used and exercised, to obtain the materials or water, so required, or the right of way to the same, irrespective of the distance thereof.

Title or
privilege
may be
tem-
porary
or per-
manent.

2. The company may, at its discretion, acquire the lands from which such material or water is taken, or upon which the right of way thereto is located, for a term of years or permanently. The notice of arbitration, if arbitration is resorted to, shall state the extent of the privilege and title required.

Tracks,
etc., not
to be
used for
other
purposes.

3. The tracks, spurs or branch lines constructed or laid by the company under this section shall not be used for any purpose other than aforementioned, except by leave of the Board and subject to such terms and conditions as the Board sees fit to impose. 51 V., c. 29, s. 113, Am.; 2 Edw. VII., c. 29, s. 1, Am.

Corresponds to section 113 and section 114 (Act of 1888). The present section has been amended in several important respects. Note the exception of the provisions of section 123, sub-section 2, which corresponds to the concluding portion of section 113 in the original Act, has been amended by the substitution of the words "shall state the extent of the privilege and title required" for the words "shall state the interest and powers required." Sub-section 3 is new.

Under the provisions of the Railway Act of 1888 it was held in *Watson v. Northern R.W. Co.*, 5 O.R. 550, that the Northern Railway had no power to take land for the purpose only of obtaining gravel. In the Act of 1888 the provisions of section 113 were made clear upon this point. In *Vezina v. The Queen*, 17

S.C.R. 1, it was held that where land taken by a railway company for the gravel thereon, the owner is only entitled to compensation for the land so taken as farm land, where there is no market for the gravel. In *Township of Brock v. Toronto & Nipissing R.W. Co.*, 37 U.C.R., 372, the defendants were obliged to pay for materials taken by them, the action being for damages for trespass. The expropriation clauses did not apply. In *Quebec Bridge Co. v. Roy*, 32 S.C.R. 572, it was held that the place where materials are found, mentioned in sections 114 of the Act of 1888, meant the place where such materials were naturally situated and not any other place to which they might have been subsequently transported. Former section 114 was amended by 2 Edw. VII. ch. 29, in consequence no doubt of this decision.

As to property in sand and gravel on highways see

Municipality of Louise v. Canadian Pacific R.W. Co., 3 Can. Ry. Cas. 65.

142. Whenever the company can purchase a larger quantity of land from any particular owner at a more reasonable price, on the average, or on more advantageous terms, than it could obtain the portion thereof which it may take from him without his consent, it may purchase the same, and upon such purchase may sell and dispose of any part thereof which may be unnecessary for its undertaking. 51 V., c. 29, s. 115, Am.

When company may purchase whole of any lot of land traversed.

Corresponds in part to section 115 of the Act of 1888. The scope of the present section appears to be wider. The former section was limited to cases where the land was required for the purpose of procuring sufficient land for stations or gravel pits or for constructing, maintaining and using the railway. Such additional land cannot, however, be taken under the compulsory provisions of the Act.

143. Every company may, on and after the first day of November, in each year, enter into and upon any lands of His Majesty, or of any person, lying along the route or line of the railway, and may erect and maintain snow fences thereon, subject to the payment of such land damages, if any, as are thereafter

Erection of snow fences.

Compensation.

established, in the manner provided by law with respect to such railway, to have been actually suffered; but every snow fence so erected shall be removed on or before the first day of April then next following. 51 V., c. 29, s. 116, Am.

This section is practically the same as section 116 (Act of 1888).

Autho-
rity to
certain
persons
to sell
and con-
vey lands
to the
company.

144. All tenants in tail or for life, *grevés de substitution*, guardians, curators, executors, administrators, trustees and all persons whomsoever, not only for and on behalf of themselves, their heirs and successors, but also on behalf of those whom they represent, whether infants, issue unborn, lunatics, idiots, *femes-covert* or other persons, seized, possessed of or interested in any lands, may contract and sell and convey to the company all or any part thereof. 51 V., c. 29, s. 136.

Order of
judge re-
quisite.

145. When such persons have no right in law to sell or convey the rights of property of the said land, they may obtain from a judge, after due notice to the persons interested, the right to sell the said land; and the said judge shall give such orders as are necessary to secure the investment of the purchase money, in such a manner as he deems necessary, in accordance with the law of the province, to secure the interests of the owner of the said land. 51 V., c. 29, s. 137, Am.

Corresponds to section 137 (Act of 1888). The changes are largely verbal. One change being the substitution in the present section of the words "may obtain" for "shall obtain" as to the persons concerned.

A tenant for life with remainder to her children must during their infancy obtain an order from the judge under this section.
In re Dolsen, 13 P.R. 84.

Limita-
tion
of powers
to sell
and con-
vey in
certain
cases.

146. The powers, by the last two preceding sections conferred upon rectors in possession of glebe lands in the Province of Ontario, ecclesiastical and other corporations, trustees of land for church or school purposes, executors appointed by wills under

which they are not invested with any power over the real property of the testator, administrators of persons dying intestate, but at their death seized of real property, shall only extend and be exercised with respect to any of such lands actually required for the use and occupation of the company. 51 V., c. 29, s. 138, Am.

Corresponds to section 138 (Act of 1888), the change being purely verbal, consisting in the substitution of the words in the present section "by the last two preceding sections" for the word "herein" in the former Act.

147. Any contract, agreement, sale, conveyance and assurance, so made hereunder shall be valid and effectual in law, to all intents and purposes whatsoever, and shall vest in the company receiving the same, the fee simple in the lands in such deed thereof described, freed and discharged from all trusts, restrictions and limitations whatsoever; and the person so conveying is hereby indemnified for what he does by virtue of or in pursuance of this Act. 51 V., c. 29, s. 139, Am.

Effect of convey -
ance
under
preced-
ing sec-
tions.
Indem-
nity to
persons
acting in
pursu-
ance of
this Act.

Corresponds to and is the same as section 139 in the former Act, with the insertion of "thereof" between "deed" and "described." In *Anglin v. Nickle*, 30 U.C., C.P. 72, and *Great Western R. W. Co. v. Lutz*, 32 U.C., C.P. 166, it was held that the fee simple in the lands taken is vested in the company. Where the owner of lands agreed to give a railway company the lands required for right of way free, a subsequent owner is not entitled to recover compensation. *Thompson v. Canada Central R.W. Co.*, 3 O.R. 136. In *Bryson v. Ontario & Quebec R.W. Co.*, 8 O.R. 380, an agreement made with a married woman without her husband's concurrence, and conveyance of land to the railway company was upheld.

148. The company shall not be responsible for the disposition of any purchase money for lands taken by it for its purposes, if paid to the owner of the land, or into court for his benefit. 51 V., c. 29, s. 140.

Responsi-
bility as
to pur-
chase
money.

It was held under the former Railway Act, C.S.C., cap. 66, and 24 Vict., cap. 27, that notwithstanding the similar provisions contained in that Act, although the tenant for life could sell and convey in fee simple the land required for the railway, the company is not warranted in paying to the tenant for life the full amount of the compensation agreed on, but was compelled afterwards at the suit of a person interested in the remainder to make good the amount of his interest.

Cameron v. Wigle, 24 Gr. 8.

In *Young v. Midland R.W. Co.*, 16 O.R. 738, 19 A.R. 265, 22 S.C.R. 190, *Cameron v. Wigle* was approved, and it was held that under the similar provisions of the Act then in force, coupled with the provisions which are embodied in section 173 of the present Act, that the tenant for life had no power to receive the purchase money, and the company was responsible to the heirs-at-law of the person entitled in reversion.

See also *Owston v. Grand Trunk R.W. Co.*, 28 Gr. 428.

Dunlop v. Canada Central R.W. Co., 45 U.C.R. 74.

Scottish American Ins. Co. v. Prittie & Toronto Belt Line R.W. Co., 20 A.R. 398.

A tenant for life may maintain an action of trespass against the defendants, who had entered, having made compensation only to the owner of the fee. *Slater v. Canada Central R.W. Co.*, 25 Gr. 363.

Contracts made before deposit of plans, etc.

149. Any contract or agreement made by any person authorized by this Act to convey lands, either before the deposit of the plan, profile and book of reference, or before the setting out and ascertaining of the lands required for the railway, shall be binding at the price agreed upon for the same lands, if they are afterwards so set out and ascertained within one year from the date of the contract or agreement, and although such land has, in the meantime, become the property of a third person; and possession of the land may be taken, and the agreement and price may be dealt with, as if such price had been fixed by an award of arbitrators as hereinafter provided, and the agreement shall be in the place of an award. 51 V., c. 29, s. 141, Am.

Corresponds to section 141 (Act of 1888). The amendments are simply the substitution of the words "plan, profile and book of reference" for "map, or plan and book of reference" in the third line. An interesting question arises under the wording of this section, "Although such land has in the meantime become the property of a third person," in view of the provisions of the Ontario Registry Act and similar Statutes, which does not appear to have been determined.

See *Tolton v. Canadian Pacific R.W. Co.*, 22 O.R. 204, and cases cited therein.

150. All persons who cannot, in common course of law, sell or alienate any lands so set out and ascertained, shall agree upon a fixed annual rent as an equivalent, and not upon a principal sum, to be paid for the lands; and if the amount of the rent is not fixed by agreement, it shall be fixed and all proceedings shall be regulated, in the manner herein prescribed. 51 V., c. 29, s. 142, Am.

Rental shall be fixed when parties cannot sell.

Corresponds to section 142 (Act of 1888). The amendment consists in the omission of the word "voluntary" before the word "agreement" and of the words "or compromise" following that word which appear in the original section. The use of the words "herein prescribed" instead of the words "hereinbefore provided" appearing in numerous other sections has probably no significance. The word "herein" would probably be read as equal to "in this Act."

151. Such annual rent and every other annual rent, agreed upon or ascertained, and to be paid for the purchase of any lands, or for any part of the purchase money of any lands, which the vendor agrees to leave unpaid, shall be chargeable as part of the working expenditure of the railway upon the deed creating such charge and liability being duly registered in the registry office of the proper district, county or registration division. 51 V., c. 29, s. 143, Am.

Lien for payment of rent.

Corresponds to section 143 (Act of 1888) with considerable amendments. The former section has been the subject of much

comment, although not the subject of any reported cases in this country. It provided that the rent should be a charge upon the railway and tolls in preference to all other claims except charges created by section 94 of the Act. "By" was an obvious mistake for "under." Section 94 created no charge, merely gave power to make one. The effect of the present section making the rent and also any purchase money agreed to be left unpaid, chargeable as part of the working expenditure coupled with the interpretation of "working expenditure" as set out in section 2, sub-section (cc), and the provisions as to "working expenditure" contained in section 112 is to make this charge along with the other charges therein first liens upon the railway, and as between the various items mentioned under that head it is conceived that in case of deficiency it would be borne rateably.

An owner who has made an agreement as to the amount of compensation is entitled to enforce his claim for compensation under an award as against the company, and has a vendor's lien upon the land taken for the amount payable, with such provisions as are necessary to realize by means of a sale, but he is not entitled to an injunction to restrain the defendants from operating the railway on the lands, nor to an order for delivery up of possession.

Lincoln Paper Mills Co. v. St. Catharines & Niagara Central R.W. Co., 19 O.R. 106.

Expro- priation proceed- ings after deposit of plan, etc.	Notice.	Applica- tion to owners.	Agree- ments autho- rized.	<p>152. After the expiration of ten days from the deposit of the plan, profile and book of reference in the office of the registrar of deeds, and after notice thereof has been given in at least one newspaper, if there is any, published in each of the districts and counties through which the railway is intended to pass, application may be made to the owners of lands, or to persons empowered to convey lands, or interested in lands, which may suffer damage from the taking of materials, or the exercise of any of the powers granted for the railway; and, thereupon, agreements and contracts may be made with such persons, touching the said lands or the compensation to be paid for the same, or for the damages, or as to the mode in which such compensation shall be ascertained, as seems expedient to both parties; and in case of</p>
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disagreement between them, or any of them, all questions which arise between them shall be settled as hereinafter provided. 51 V., c. 29, s. 144, Am. Disagreements.

Corresponds to sec. 144 (Act of 1888) and is practically identical therewith, the only alteration being the substitution of the words "plan, profile and book of reference" for "map or plan and book of reference." See discussion and cases cited under sec. 161, *infra*.

"Persons interested in lands" includes a tenant for years. *Johnston v. Ontario, Simcoe & Huron R.W. Co.*, 11 U.C.R. 246, decided that a tenant for years might maintain trespass against the defendants, who had entered, having made compensation only to the owner of the fee. See also *Detlor v. Grand Trunk R.W. Co.*, 15 U.C.R. 595; *Slater v. Canada Central R.W. Co.*, 25 Gr. 363.

Under this section the right to compensation is also given in the following cases:—Obstruction or deviation of a water-course: *Anderson v. Grand Trunk R.W. Co.*, 11 U.C.Q.B. 126; *McGillivray v. Great Western R.W. Co.*, 25 U.C.Q.B. 69; *Arthur v. Grand Trunk R.W. Co.*, 25 O.R. 37; 22 A.R. 89. See also *Sarnia v. Great Western R.W. Co.*, 17 U.C.Q.B. 65; *Utter v. Great Western R.W. Co.*, 17 U.C.Q.B. 392. In this case negligence in construction was alleged.

The right to drainage of surface water does not exist *jure naturae*: *Ostrom v. Sills*, 24 A.R. 539; 28 S.C.R. 526; hence damages are not recoverable for obstructing the flow of surface water as distinct from obstructing a water-course: *Crewson v. Grand Trunk R.W. Co.*, 27 U.C.Q.B. 68; *Nichol v. Canada Southern R.W. Co.*, 40 U.C.Q.B. 583.

In *L'Esperance v. Great Western R.W. Co.*, 14 U.C.Q.B. 173, lands were sold for the purpose of the railway, previously drained by a ditch made by plaintiff. Held, No action lay for obstructing the ditch by constructing the railway, the matter being one which should have been taken into consideration at the time of the sale, or dealt with upon the arbitration.

In *Hill v. Buffalo & Lake Huron R.W. Co.*, 10 Gr. 506, a railway company, taking over a prior undertaking, were not compelled to specifically perform an agreement with the owner, to make a culvert through their embankment, having been allowed to construct the railway without notice of the agreement, but

were allowed to take arbitration proceedings, as if the agreement had not been made, but see *Tolton v. Canadian Pacific R.W. Co.*, 22 O.R. 204, where it has held, a water-course having been diverted without authority, although compensation was made to the plaintiff's predecessors in title, that the equitable easement thereby created did not avail the railway company as against the plaintiff, a *bona fide* purchaser for value, without actual notice and claiming under a registered deed from the previous owner; a reference was directed to ascertain the compensation to which plaintiff would be entitled as upon an authorized diversion of the water-course.

Alton v. Hamilton & Toronto R. W. Co., 13 U.C.R. 595, is distinguishable from the foregoing cases upon the ground that negligence was alleged therein, this allegation being held sufficient to support the verdict.

Filing
plan
deemed
general
notice

Date for
purposes
of valuation.

153. The deposit of a plan, profile and book of reference, and the notice of such deposit, shall be deemed a general notice to all parties of the lands which will be required for the railway and works; and the date of such deposit shall be the date with reference to which such compensation or damages shall be ascertained. 51 V., c. 29, s. 145, Am.

Corresponds to sec. 145 (Act of 1888), with the substitution of the words "plan and profile" for the words "map or plan" appearing in that section: *James v. Ontario & Quebec R.W. Co.*, 15 A.R. 1; 12 O.R. 624; *Arthur v. Grand Trunk R.W. Co.*, 25 O.R. 37; 22 A.R. 89.

Damages, although ascertained as at the date when the land is taken or injuriously affected under this section, are not confined to the damages accrued to such date, the whole damages may be assessed once for all as for a permanent injury: *Arthur v. Grand Trunk R.W. Co.* (*supra*); *Parkdale v. West*, 12 App. Cas. at p. 616; *North Shore R.W. Co. v. Pion*, 14 App. Cas., p. 630.

What
notice
must
contain.

154. The notice served upon the party shall contain—

(a.) a description of the lands to be taken, or of the powers intended to be exercised with regard to any lands, and describing the lands;

(b.) a declaration of readiness to pay some certain sum or rent, as the case may be, as compensation for such lands or for such damages. 51 V., c. 29, s. 146, Am.

Corresponds to sec. 146 (Act of 1888), and is identical with sub-secs. "a" and "b" of that section. Sub-sec. "c" (Act of 1888) has been eliminated. The scheme of the present Act provides for a different method of appointing arbitrators or a sole arbitrator from that provided by the Act of 1888. See sec. 159, *infra*, and compare with secs. 150 and 151 of the Act of 1888.

A form of notice and certificate is given in the appendix. The notice and surveyor's certificate under section 155 should state in *cash* the sum which would be a fair compensation for the lands to be taken and damages. Where in addition to a sum in *cash* certain crossings and station privileges were offered as compensation for the land and damages, which was accompanied by a surveyor's certificate that the sum offered was a fair compensation therefor; held to be no proper notice or certificate, and a judge's order for taking immediate possession was made without jurisdiction. *Brooke v. Toronto Belt Line R.W. Co.*, 21 O.R., 401, decided under the corresponding section, (in the same words), of the Ontario Railway Act, R.S.O. (1897), cap. 207, sec. 20.

A mortgagor who has conveyed his equity of redemption subject to payment of the mortgage is not entitled to notice of expropriation: *Farr v. Howell*, 31 O.R. 693.

If the railway company take possession of the lands without any formality, the owner is not bound to resort to arbitration proceedings, but may sue to recover possession or for damages for trespass: *Huot v. Q., M. & C. R.W. Co.*, Q.R. 10 S.C. 373; *Wilkes v. Gzowski*, 13 U.C.R. 308; *Mason v. South Norfolk R.W. Co.*, 19 O.R. 132.

After service of the notice to treat under the Lands Clauses Act, 1845, corresponding to the notice of arbitration under this sec. 154, a person purchasing an interest in the land becomes a purchaser of an interest in the compensation, see sec. 173, also *Carnochan v. Norwich & Spalding R.W. Co.*, 26 Beav. 169. After service of the notice to treat, the Court of Appeal in England have decided that no onerous interest, either in land taken or in land injuriously affected, can be created by the land-owner to the

prejudice of the promoters (the railway company) (1903), 1 K.B. 652, reversing the decision of Lord Alverstone, C.J. (1901), 2 K.B. 753, affirmed by the House of Lords, 20 T.L.R. 673, *Mercer v. The Liverpool, St. Helens and South Lancashire R.W. Co.* The law had previously been well settled with respect to lands taken, see the cases cited in the judgments, and is now settled as to lands injuriously affected. A notice of arbitration, which includes lands the company are not authorized to take is void, and the company will be restrained from taking any proceedings under it: *Grand Trunk R.W. Co. v. Lindsay, Bobcaygeon & Pontypool R.W. Co.*, 3 O.W.R. 54.

Notice of desistment in that case should be given under sec. 166, and a fresh notice served, describing accurately the lands the company are authorized to take: *Widder v. Buffalo & Lake Huron R.W. Co.*, 24 U.C.R. 232-3. See also *Wrigley v. Lancashire & Yorkshire R.W. Co.*, 4 Giff. 352.

In *Hendrie v. Toronto, Hamilton & Buffalo R.W. Co.*, 26 O.R. 667; 27 O.R. 46, it was held, following *Corporation of Parkdale v. West*, 12 A.C. 602, that the sections of the Act of 1888 under the headings "Plans and Surveys," and "Lands and Their Valuation," apply to lands injuriously affected, as well as to land taken, by the railway, the corresponding sections here appear under "Location of Line," and "Taking and Using Lands."

Must be
accom-
panied by
certifi-
cate. **155.** Such notice shall be accompanied by the certificate of a sworn surveyor for the province in which the lands are situated, or an engineer, who is a disinterested person, which certificate shall state—

Contents
of certifi-
cate. (a.) that the land, if the notice relates to the taking of land shown on the said plan, is required for the railway or is within the limit of deviation allowed by this Act;

(b.) that he knows the land, or the amount of damage likely to arise from the exercise of the powers; and

(c.) that the sum so offered is, in his opinion, a fair compensation for the land and damages aforesaid. 51 V., c. 29, s. 147. Am.

Corresponds to sec. 147 in the Act of 1888, with very slight amendments, the differences being in the main section the elimination of the words "and is not the arbitrator named in the notice," the reason for this omission is obvious, in view of the elimination of sub-sec "c" in the preceding section. In sub-sec. "a" the words "map or" are left out.

The words "or is within the limit of deviation allowed by this Act" seem to be retained by oversight, in view of the provisions of sec. 130, and the alterations made in other sections of the Act, giving the company no power to deviate except with the permission of the Board, after taking the same steps as for an original location. It was held in *Widder v. Buffalo & Lake Huron R.W. Co.*, 24 U.C.R. 520, under C.S.C., cap. 66, sec. 11, sub-sec. 7, which is very similar in language to the present section, that

(1) Where no land is taken and the company denies the owner's right to compensation, a surveyor's certificate is unnecessary;

(2) The notice need not be under the corporate seal of the company;

(3) It is not desirable that the company's arbitrator should be one of their own officers.

156. In the following sections of this Act, down to sec. 174 inclusive, unless the context otherwise requires, the expression "court" shall mean a superior court of the province or district, or the county court of the county, where the lands lie, and the expression "judge" shall mean a judge of such superior court or county court; but any proceedings commenced in one court having proper jurisdiction shall be continued therein.

This section is new and makes a change in the procedure constituting the county court of the county, where the lands are situated, a court under the succeeding sections of the Act (down to 174), and the judge of the county court, a judge within the meaning and for the purposes of the said sections. Under the Act of 1888, "court" means a superior court of the province, county courts, and judges of the county courts, had no jurisdiction as such.

Service
by publi-
cation.

157. If the opposite party is absent from the district or county in which the lands lie, or is unknown, an application for service by advertisement may be made to a judge. 51 V., c. 29, s. 148.

Pro-
cedure
on service
by publi-
cation.

158. The application for service by advertisement shall be accompanied by such certificate as aforesaid, and by an affidavit of some officer of the company, that the opposite party is so absent, or that, after diligent inquiry, the person on whom the notice ought to be served cannot be ascertained; and the judge shall order a notice as aforesaid, but without such certificate, to be inserted, three times in the course of one month, in a newspaper published in the district or county, or if there is no newspaper published therein, then in a newspaper published in some adjacent district or county. 51 V., c. 29, s. 149.

The language of this section is imperative. Its conditions must be complied with before notice can be served by publication. When this has been done, the judge is required to make the order.

Failure
to accept
after
service of
notice.

159. If within ten days after the service of such notice, or within one month after the first publication thereof, the opposite party does not give notice to the company that he accepts the sum offered by it, the judge shall, on the application of the com-

Appoint-
ment of
arbitra-
tor.

pany, six days' notice of which shall be given to the opposite party, appoint a person to be sole arbitrator for determining the compensation to be paid as aforesaid: Provided that the judge

Three
arbitra-
tors, if
requested
by either
party.

shall, at the request of either party on such application, appoint three arbitrators to determine such compensation, one of whom may be named by each party on such application. 51 V., c. 29, s. 150, Am.

The provisions of this section are substituted for the provisions of 150 and 151 of the Act of 1888, and provide a substantially different procedure. Under the former Act, if, within the time prescribed, the opposite party did not give notice to the company naming his arbitrator, the judge was required, on the

application of the company, to name a sole arbitrator. If the opposite party gave notice naming an arbitrator, the two arbitrators jointly appointed a third, or in the event of their failure to agree, the judge appointed the third arbitrator. Many of the authorities under the former sections, as to the effect of giving notice and of failure on the part of the parties served with the notice to appoint an arbitrator, will be of no assistance under the present section. This section contains no provision for application by the party, but only for application by the company. The language of this section is imperative. Either party is entitled to have the matter determined by three arbitrators, one of whom may be named by each party on the application. In *Canadian Pacific R.W. Co. v. Batter*, 1 Can. Ry. Cas. 457, and *Re Toronto, Hamilton & Buffalo R.W. Co. and Burke et al.*, 27 O.R. 690, it was held that the words "opposite party" in sec. 150 (Act of 1888) include both mortgagor and mortgagee, that notice given by the owner of lands, not concurred in by the mortgagee, was not sufficient, and a sole arbitrator was appointed on application of the railway company. The scheme of the Act of 1888 was held in *Stewart v. Ottawa & New York R.W. Co.*, 30 O.R. 599, to be, that the company should deal with the party in possession as owner—the matter of title to remain in abeyance until a later stage in the expropriation proceedings.

In Quebec, hypothec stands in a different position from mortgage in Ontario, a personal claim merely arising in the case of the former, but no claim upon the land. See *Brunet v. Montreal & Ottawa R.W. Co.*, Q.R. 3 S.C. 445; Abbott on Railways, 243.

In *McGibbon v. North Simcoe R.W. Co.*, 26 Grant 226, it was held that a sole arbitrator appointed by the judge, without notice of the intended application for his appointment having been given to the owner, had not been validly appointed, and the landowner was not bound by the act of the arbitrator, so appointed, in ascertaining the compensation.

160. The arbitrators, or the sole arbitrator, as the case may be, shall be sworn before a justice of the peace for the district or county in which the lands lie, faithfully and impartially to perform the duties of their or his office, and shall proceed to ascertain such compensation in such way as they or he, or a ma-

Call of
arbitra-
tors.

Duties.

Award. jority of them, deem best; and the award of such arbitrators, or of any two of them, or of the sole arbitrator, shall be final and conclusive, except as hereinafter provided; but no such award shall be made, nor any official act be done, by such majority, except at a meeting held at a time and place of which the other arbitrator has had at least two clear days' notice, or to which some meeting at which the third arbitrator was present had been adjourned. 51 V., c. 29, s. 152, Am.

Pro-
cedure.

Corresponds to sec. 152 in the Act of 1888. The latter portion of that section, "And no notice to either of the parties shall be necessary, but each party shall be held sufficiently notified through the arbitrator appointed by him or whose appointment he required," being eliminated.

There is no provision requiring the giving of notice to the parties, the whole matter as to procedure being apparently left with the arbitrators under this section.

In *Brunet v. St. Lawrence & Adirondack R.W. Co.*, Q.R. 6 Q.B. 116, an award was set aside where one of the arbitrators conducted himself as the advocate or agent of the party appointing him, neglected to attend a number of the meetings of the arbitrators or afterwards to read the depositions of witnesses taken at such meetings.

"Shall be final and conclusive except as hereinafter provided" refers to provisions of sec. 168, giving a right of appeal, and also preserving the existing law or practice as to setting aside awards.

In *Palmer v. Metropolitan*, 21 L.J.Q.B. 259, it was held that the declaration required by sec. 33 of the Lands Clauses Act, 1845, corresponding to the oath mentioned in this section, may be dispensed with by consent.

Generally as to misconduct of arbitrators and grounds for setting aside awards, see Russell on Awards, 7th ed., p. 664. In *re McQuillen and Guelph Junction R.W. Co.*, 12 P.R. 294, a ratepayer of a city which was a shareholder and creditor, held not disqualified as arbitrator. In *Re Ontario & Quebec R.W. Co. and Taylor*, 6 O.R. 338, the award was set aside and remitted back to arbitrators for further consideration on account of improper items having been included.

The Court will not interfere with the award, if the sum awarded is not such as to shock one's sense of justice: *Benning v. Atlantic & N. W. R.W. Co.*, 20 S.C.R. 177.

Notwithstanding the language of the section, that the arbitrators shall proceed to ascertain such compensation in such way as they, he, or a majority, deem best, it has been held by the Privy Council that an appellate court rightly exercises its jurisdiction by viewing the award as if it had been the judgment of a subordinate court, that is, by deciding whether a reasonable estimate of the evidence had been made. It is not authorized by the section to disregard the award and deal with the evidence *de novo* as if it had been a court of first instance: *Atlantic & N. W. R.W. Co. v. Wood* (1895), A.C. 257.

The same decision was given under a similar section of the Ontario Railway Act: *In re Hamilton & North Western R.W. Co. v. Boys*, 44 U.C.R. 626.

In *Great Western R. W. Co. v. Bailey*, 12 U.C.R. 106, and three other cases, the court set aside the awards, the sum awarded being so excessive as to show clearly that the arbitrators had disregarded the direction of the statute, to consider the benefit to the property, as well as the damage done.

In *Grand Trunk R.W. Co. v. Coupal*, 28 S.C.R. 531, an award was set aside where the arbitrators proceeded upon a wrong principle in estimating the amount awarded by taking an average of the different estimates put in evidence.

161. The arbitrator or arbitrators, in deciding on such value Increased value of remaining lands to be considered or compensation, shall take into consideration the increased value, beyond the increased value common to all lands in the locality, that will be given to any lands through or over which the railway will pass, by reason of the passage of the railway through or over the same, or by reason of the construction of the railway, and shall set off such increased value that will attach to the said lands or grounds, against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands as aforesaid. 51 V., c. 29, s. 153.

Corresponds to sec. 153 (Act of 1888), with the insertion of the words, after the words "increased value" appearing in that

section, "beyond the increased value common to all lands in the locality." The words inserted make clear what was doubtful under the former section. The rule under the former section is discussed in *Ontario & Quebec R.W. Co. v. Taylor*, 6 O.R. 348; *James v. Ontario & Quebec R.W. Co.*, 12 O.R. 624; 15 A.R. 1; *Dickson v. Chateauguay & Northern* (under Quebec Act), Q.R. 17 S.C. 170.

Re Credit Valley R.W. Co. and Spragge, 24 Gr. 231, cannot be considered as law under the amended section.

As to what may be the subject of compensation, viz., land taken or injuriously affected. See Brown and Allan on Compensation, pp. 111-121, and pp. 129-143; Brown and Theobald on Law of Railways, 3rd Ed., p. 173 *et seq.*

The decisions under the Railway Clauses Act, 1845, and the Land Clauses Act, 1845, as to compensation where no land is taken but the damage results from the operation of the railway, may properly be applied to cases arising under the Canadian Railway Act: *Powell v. Toronto, Hamilton & Buffalo R.W. Co.*, 25 A.R. 209.

It is not necessary that any part of the land should be actually taken. It is sufficient if it is injuriously affected to entitle the owner to receive compensation: *Regina v. Eastern Counties R.W. Co.*, 2 Q.B. 347; *Glover v. North Staffordshire*, 16 Q.B. 912; *Hammersmith R.W. Co. v. Brand*, L.R. 4 H.L. 171; *Metropolitan Board of Works v. McCarthy*, L.R. 7 H.L. 243.

Where no land is taken, damages cannot be recovered for the annoyance by reason of the operation of the railway: *Attorney-General and Hare v. Metropolitan* (1894), 1 Q.B. 384.

But where a part of the owner's land is taken, depreciation in the value of the remainder of his property by reason of its proximity to the railway, from vibration, noise, smoke, dust, etc., may be taken into consideration as an element in fixing compensation: *Duke of Buccleuch v. Metropolitan Board of Works*, 5 H.L. 419; *Ford v. Metropolitan R.W. Co.*, 17 Q.B.D. 20, followed in *Re Toronto, Hamilton & Buffalo R.W. Co. and Kerner*, 28 O.R. 14.

The damage to which a party is entitled is only damage to land, or an interest in land: *Metropolitan Board of Works v. McCarthy*, L.R. 7 H.L. 243; *Caledonian R. W. Co. v. Walker's Trus-*

tees, 7 A.C. 259, followed in *St. Catharines R.W. Co. v. Norris*, 17 O.R. 667; *Bowen v. Canada Southern R.W. Co.*, 14 A.R. 1; *Powell v. T., H. & B. R.W. Co.*, 25 A.R. 209.

Birely v. Same, 28 O.R. 468, must be considered as overruled.

The owner of land fronting, whether a waterway or landway, tidal or non-tidal, has a right to access thereto, and is entitled to compensation if his access is cut off: *Lyon v. Fishmongers' Co.*, 1 A.C. 662; *Pion v. North Shore R.W. Co.*, 14 S.C.R. 44, and 14 A.C. 612; *Bigaouette v. North Shore R.W. Co.*, 17 S.C.R. 363; *Regina v. Buffalo & Lake Huron R.W. Co.*, 23 U.C.R. 208; *Quillinan v. Canada Southern R.W. Co.*, 6 O.R. 567; *Mason v. South Norfolk R.W. Co.*, 19 O.R. 132.

There is a similar right to compensation where the access is impeded by raising, lowering or narrowing the highway: *Regina v. St. Luke's*, L.R. 7 Q.B. 148; *Regina v. Eastern Counties R.W. Co.*, 2 Q.B. 347; *Wood v. Stourbridge R.W. Co.*, 16 C.B.N.S. 222.

If the injury is not to the property as such, but merely to the property as used for a particular purpose, such as a business, or, in other words, to the business carried on upon the property, no compensation can be recovered. The damage must be one which is sustained in respect of the property itself, and not in respect of any particular use to which it may from time to time be put. It must be less valuable for all purposes: *Rickett v. Metropolitan R. W. Co.*, L.R. 2 H.L. 175, followed in *Re Devlin and Hamilton & Lake Erie R.W. Co.*, 40 U.C.R. 160.

Where the construction of a railway constituted a breach of a restrictive covenant as to erections to be made on land, the person injured was held entitled to compensation, although no land was actually taken: *Long Eaton Recreation Co. v. Midland R.W. Co.* (1902), 2 K.B. 574.

162. If by an award of arbitrators made under this Act, the sum awarded exceeds the sum offered by the company, the costs of the arbitration shall be borne by the company; but if otherwise, they shall be borne by the opposite party, and be deducted from the compensation, and in either case the amount of such costs, if not agreed upon, may be taxed by the judge. 51 V., c. 29, s. 154.

Costs where award exceeds or is less than company's offer.

Corresponds to sec. 154 (Act of 1888). It is to be noted the provisions of this section are imperative, and when a case arises within its provisions, must be disposed of accordingly.

By the interpretation clause section 2 (new provision) "costs" includes "fees, counsel fees and expenses."

At the arbitrators' first meeting the railway company tendered a deed binding themselves to make and maintain a crossing, the value of which appeared to have been taken into consideration by the arbitrators, but the amount awarded was less than the amount offered by \$119. It was held that under the circumstances the provision of the section as to costs did not apply, and neither party was entitled to costs:

In the opinion of Galt, C.J., which appears to have been also the opinion of the majority in the Supreme Court, the act of the judge in taxing costs under the statute is merely ministerial. There is no right under this section to decide as to the right to costs, and they could probably only be recovered after taxation by action.

Ontario & Quebec R.W. Co. v. Philbrick, 5 O.R. 674, 12 S.C.R. 288.

Under a similar statute in 16 Viet. cap. 99, sec. 5, where no provision was made for recovering the costs from the railway company, the court refused to make an order on the company for their payment and *semble* that the only remedy is by an action of debt on the statute.

Re Foster v. Great Western R.W. Co., 32 U.C.R., 503.

The owner is not entitled to a lien on the land for costs of the arbitration.

Ferrars v. Staffordshire & Uttoxeter R.W. Co., L.R., 13 Eq., 524.

The practice has been that upon application to a judge in chambers, the bill is referred to one of the taxing officers to ascertain what has been properly incurred, the result being adopted or varied by the judge.

Re McRae v. Ontario & Quebec R.W. Co., 12 P.R. 282 and 327. *Re Oliver and Bay of Quinte R.W. Co.*, 3 Can. Ry. Cas., 368, 7 O.L.R. 567.

The taxation of costs by the judge is final and without appeal.

Wood v. Atlantic & North Western R. W. Co., Q.R., 9 S.C., 297.

This rule as to costs does not extend to the costs of an appeal.

Re Credit Valley R.W. Co. and Spragge, 24 Gr., 231.

It is no objection to an award that the arbitrators award costs, for, if unauthorized, it is easily separable from the rest of the award.

Widder v. Buffalo & Lake Huron R. W. Co., 24 U.C.R., 520.

An agreement to pay all costs incidental to the arbitration does not extend to costs as between solicitor and client, nor to costs preliminary to the arbitration.

Bronson v. Canada Atlantic R. W. Co., 13 P.R. 440.

The corresponding provisions of the Land Clauses Act, 1845, sec. 34, differ somewhat from these provisions, their effect being that the costs must be borne by the company (promoters of the undertaking), unless the arbitrators award the same or a less sum than that offered, in which case each party bears his own costs "incident to" the arbitration, and the costs of the arbitrators are borne by the parties in equal portions. Costs of a special case are incident to such arbitration.

Re Arbitration between Holliday and Corporation of Wakefield, L.R., 20 Q.B.D. 699.

As the words "incident to" appearing in section 34 of the English Act, are not in this section, this case would probably not be an authority under it.

The offer referred to in the section is the "sum or rent" referred to in sub-sec. "b" of sec. 154, *supra*, which is referred to as the "sum offered" in sub-sec. "c" of section 155.

Query. Can the company, by making a separate offer in writing of an increased amount before the arbitration is begun, get the benefit of this section, in case the amount awarded be less than such offer? It has been held under the Land Clauses Act, 1845, that the offer of compensation must be unconditional, not an offer of one sum for compensation and costs.

Balls v. Metropolitan Board of Works, L.R. 1 Q.B. 337.

An offer made after arbitrators are appointed is too late.

Fitzhardinge v. Gloucester & Berkeley Canal Co., L.R. 7 Q.B. 776.

Gray v. N. E. R.W. Co., 1 Q.B.D. 696.

Arbitrators may take evidence under oath. **163.** The arbitrators, or a majority of them, or the sole arbitrator, shall examine on oath or solemn affirmation the parties or such witnesses as appear before them or him. 51 V., c. 29, s. 155 (1), Am.

Powers of arbitrators. **2.** Such arbitrator or arbitrators shall have and may exercise with respect to such arbitration all the powers mentioned in section 49 of this Act, excepting paragraph (c) of sub-section 1 thereof, and section 50 of this Act shall apply to persons attending and giving evidence to any such arbitration.

Witnesses.

Stenographers. **3.** The arbitrators shall take down in writing the evidence brought before them, unless either party requires that it be taken by means of stenography; in which case a stenographer shall be named by the arbitrators, unless the parties agree upon one, and shall be sworn before the arbitrators, or before any one of them before entering upon his duties; and the expense of such stenographer, if not determined by agreement between the parties, shall be taxed by the court or judge, and shall, in any case, form part of the costs of the arbitration; and after making their award the arbitrators shall forthwith deliver or transmit by registered letter, at the request of either party in writing, the depositions, together with the exhibits referred to therein, and all papers connected with the reference, except the award, to the clerk of the court, to be filed with the records of the said court. 54-55 V., c. 51, s. 1, Am.

Depositions transmitted to clerk of the court.

Corresponds in part to section 155 of the Act of 1888, as amended by 54 & 55 Viet., cap. 54, sec. 1.

In the 1st section the only change is the elimination of the words "And shall administer such oath or affirmation" appearing at the end of the former section. This probably makes no difference in its effect.

Sub-sec. 2 is new and important, as will be seen by reference back to secs. 49 and 50, *supra*. This gives power to make inspections, require production of books, plans, etc., and administer oaths; also gives a like power to summon witnesses as is vested in any Court in civil clauses, etc. The arbitrators had not these powers under the former Act.

McRae v. Ontario & Quebec R. W. Co., 12 P.R. 328.

The only change in sub-sec. 3 from the Act, 54 & 55 Viet. is the substitution of the words "Clerk of the Court" for the words "Clerk of the Superior Court in the Province in which the lands are situated," appearing in the former Act.

164. A majority of the arbitrators, at the first meeting after their appointment, or the sole arbitrator, shall fix a day on or before which the award shall be made, and if the same is not made on or before such day, or some other day to which the time for making it has been prolonged, either by the consent of the parties, or by resolution of the arbitrators, then the sum offered by the company, as aforesaid, shall be the compensation to be paid by the company. 51 V., c. 29, s. 156.

2. No award shall be invalidated by reason of any want of form or other technical objection, if the requirements of this Act have been substantially complied with, and if the award states clearly the sum awarded, and the lands or other property, right or privilege for which such sum is to be the compensation; and the person to whom the sum is to be paid need not be named in the award.

Sub-section 1 of this section corresponds to and is identical with section 156 of the Act of 1888. Sub-section 2 corresponds to and is identical with sub-section 1 of section 161 (Act of 1888).

In *Montreal Park and Island R. W. Co. v. Wynness*, Q.R. 14, S.C. 409, and 16 S.C. 105, it was held that an adjournment of a sittings of the arbitrators until after the date fixed for the making of the award was not in itself a sufficient extension of the time for making the award, although the attorney for the company was present and remained silent on the subject of such adjournment.

In *Demorest v. Grand Junction R. W. Co.*, 10 O.R. 515, the judge found upon the evidence that no time had been fixed by the arbitrators for making the award, and held that the sum offered by the company did not become the amount of the compensation and a reference back was ordered.

Sub-sec. 2. If the award contains an adequate and sufficient description of the land expropriates, the maxim "*falsa demonstratio non nocet*" applies.

Beaudet v. North Shore R. W. Co., 15 S.C.R. 44;

Bigaouette v. North Shore R. W. Co., 17 S.C.R. 363.

Vacancies in office of arbitrator.

No recommencement of proceedings.

165. If any arbitrator appointed by the judge dies before the award has been made, or is disqualified, or refuses or fails to act within a reasonable time, the judge, upon the application of either party, of which application six days' notice shall be given to the opposite party, and upon being satisfied by affidavit or otherwise of such death, disqualification, refusal or failure, shall appoint another arbitrator in the place of such arbitrator: Provided that in the case of any arbitrator, named by one of the parties and appointed by the judge, so dying or not acting, such party may, upon such application, name the arbitrator who shall be appointed by the judge in the place of the arbitrator so deceased or not acting; but no recommencement or repetition of the previous proceedings shall be required in any case. 51 V., c. 29, s. 157, Am.

Corresponds to section 157 (Act of 1888), with several amendments rendered necessary by the different method provided for the appointment of arbitrators. Its provisions generally are the same.

These provisions apply to the case of an arbitrator, appointed by the owner, dying four days before the time fixed for making the award. The owner is entitled to a reasonable time to appoint another arbitrator in his place and have the arbitration continued, although the time, so fixed, had expired without the making of any award.

Shannon v. Montreal Park and Island R. W. Co., 23 S.C.R. 374.

Corresponds to section 157 in the Act of 1888 with several amendments rendered necessary by the different method now provided for the appointment of an arbitrator. Generally the provisions are the same. For case of arbitrator dying before award, see

Shannon v. Montreal Park & Island Ry., 28 S.C.R. 374, *supra*.

See also as to right to sue for possession in Quebec where award having been set aside, company refuse to proceed with appointment of a new arbitrator: *Huot v. Q. M. & C. Ry.*, Q.R. 10 S.C. 373.

166. Where the notice given improperly describes the land or materials intended to be taken, or where the company decides not to take the land or materials mentioned in the notice, it may abandon the notice and all proceedings thereunder, but shall be liable to the person notified for all damages or costs incurred by him in consequence of such notice and abandonment—such costs to be taxed in the same manner as costs after an award; and the company may give to the same or any other person notice for other land or materials, or for land or materials otherwise described notwithstanding the abandonment of the former notice. 51 V., c. 29, s. 158.

Company
may
abandon
proceed-
ings.

Damages
and costs
in such
event.

Corresponds to section 158 of the Act of 1888 and is practically identical with it, the difference being the elimination of the words "In any case" at the commencement of the section and the substitution of the word "where" for "if" in the second line. The word "abandon" used in this section corresponds to the word "desist" used in the Consolidated Statutes of Canada, cap. 66. See

Re Oliver & Bay of Quinte Ry. Co., 3 Can. Ry. Cas. 384, 6 O.L.R. 543.

The question was raised in *Re Miller v. Great Western*, 13 U.C.R. 582, whether after an award has been made, the company can relinquish the land valued and claim exemption from compliance with it; it was held in *Mitchell v. Great Western*, 35 U.C.R. 148, that they could not, after the award was made, withdraw from the purchase.

In *Grimshawe v. Grand Trunk Ry. Co.*, 15 U.C.R. 224; 19 U.C.R. 493, it was held under the provision of the Act then in force, 14 & 15 Vict., cap. 51, sec. 11, that a notice for lands may be desisted from and a new notice given, even after the arbitrators had met and were engaged in the arbitration, and the award subsequently made was held void. The same conclusion was

reached in *Cawthra v. Hamilton and Lake Erie R. W. Co.*, 35 U.C.R. 581, where two arbitrators had agreed on the amount of the award and had given notice to the other, to meet to sign the award when notice of desistment and a new notice were given. It was held in the Supreme Court, *The Canadian Pacific R. W. Co. v. Little Seminary St. Thérèse*, 16 S.C.R. 606, (per Patterson & Gwynne J.J.) that an abandonment of notice to take lands must take place while the notice is still a notice and before the intention has been exercised by taking the lands: followed in *Re Haskill et al. and Grand Trunk R.W. Co.*, 3 Can. Ry. Cas. 389.

A railway company were held not compellable to take lands enclosed by an engineer without knowledge of the directors and no notice given of intention to take: *Baby v. Great Western R.W. Co.*, 13 U.C.R. 291.

The power to desist extends to lands injuriously affected as well as lands taken. With the notice of desistment a new notice should be given; without it the former notice remains in force to uphold an award duly made under it.

So decided in case of lands taken or injuriously affected under C.S.C. cap. 66, sec. 11 (7).

Widder v. Buffalo and Lake Huron R. W. Co., 24 U.C.R. 222.

Under R.S.O. (1887) cap. 165, sec. 20, a railway company having desisted once from their notice, could not again desist pending arbitration proceedings under a second notice. The company's arbitrator having withdrawn from such arbitration in deference to a notice of desistment given by the company after the amount to be awarded had been agreed upon by the other two, it was held that the company could not object to the award on the ground that he had not been asked to sign it.

Moore v. Central Ontario R. W. Co., 2 O.R. 647.

The present statute R.S.O. (1897) cap. 207, sec. 20 (16) is the same except the concluding provision that the right of desistment shall not be exercised more than once.

See also *Re Hooper and Erie & Lake Huron R.W. Co.*, 12 P.R. 408, where under peculiar circumstances, a third notice of desistment was upheld.

In *Nihan v. St. Catharines & Niagara Central R.W. Co.*, 16 O.R. 459, it was held that notice of desistment served after an Act had been passed bringing the company under the Legislative authority of the Dominion, it having been previously incorpor-

ated under an Ontario Act, was effective to avoid the bond given as security upon taking possession and that fresh security must be given by payment of money into the bank under the Dominion Act. Where the company served notice of desistment from original notice and gave no new notice to the land owner, but nevertheless entered upon the land, held that they were in the position of trespassers.

Wilkes v. Gzowski, 13 U.C.R. 308.

167. The person offered or appointed as valuator, or as sole When arbitrator interested in compensation.
 arbitrator, shall not be disqualified because he is professionally employed by either party, or has previously expressed an opinion as to the amount of compensation, or because he is related or of kin to any shareholder of the company, if he is not himself personally interested in the amount of the compensation; and no cause of disqualification shall be urged against any arbitrator appointed by the judge after his appointment, but the objection shall be made before the appointment and its validity or invalidity shall be summarily determined by the judge. 51 V., c. 29, s. 159. Time for taking objection.

Section 160 in the Act of 1888, which referred to disqualification of arbitrator appointed by the company or by the opposite party, has been omitted from this act, it being doubtless considered that all such considerations would be dealt with by the judge when appointing arbitrators under section 159.*

See *Re McQuillen & Guelph Junction R. W. Co.*, 12 P.R. 294.

The corresponding section (159) in the Act of 1888 is discussed in *Brunet v. St. Lawrence & Adirondack R. W. Co.* 3 *Revue de Jurisprudence* 332 and the propriety of appointing an engineer or surveyor who has acted for the company in laying out the railway defended on account of the special knowledge thereby acquired.

168. Whenever the award exceeds six hundred dollars, any party to the arbitration may within one month after receiving Appeal from award.
 a written notice from any one of the arbitrators or the sole arbitrator, as the case may be, of the making of the award, appeal therefrom upon any question of law or fact to a superior court;

and upon the hearing of the appeal the court shall, if the same is a question of fact, decide the same upon the evidence taken before the arbitrators, as in a case of original jurisdiction.

Practice
and pro-
ceedings
on appeal

2. Upon such appeal the practice and proceedings shall be, as nearly as may be, the same as upon an appeal from the decision of an inferior court to the said court, subject to any general rules or orders from time to time made by the said last-mentioned court, in respect to such appeals, which orders may amongst other things provide that any such appeal may be heard and determined by a single judge.

Other
remedies
not
affected.

3. The right of appeal hereby given shall not affect the existing law or practice in any province as to setting aside awards. 51 V., c. 29, s. 161, Am.

Corresponds to sub-sections 2, 3 and 4 of section 161 of the Act of 1888, sub-sec. 1 of that section now appearing as sub-sec. 2 of sec. 164. See *supra*.

The words "six hundred" in the first line have been substituted for the words "four hundred" appearing in the former section. The other changes are matters of form such as the elimination of the words "of the province in which said lands are situated" following the word "Court." This is in view of the provisions of section 156.

As to time for appealing, it was held in *Re Potter and Central Canada R. W. Co.*, 16 P.R., page 16, that notice of appeal given within one month is sufficient. It is not necessary that the appeal should be brought on for hearing within that time; the appeal should be to a judge in single court, and not to the Divisional Court. In *Re Montreal & Ottawa Ry. v. Ogilvie*, 18 P.R., 120, the last case was approved, and the appeal being brought in the wrong court, an order was made under Ontario Consolidated Rule 784, transferring it to the proper court on payment of costs.

Where no damages are awarded, there is no appeal by the land-owner.

Re Toronto, Hamilton & Buffalo R.W. Co., and Kerner, 28 O.R. 14.

In *Birely v. Toronto, Hamilton, & Buffalo R. W. Co.*, 25 A.R. 88, it was held under this section that an appeal lies in the Province of Ontario, either to the High Court of Justice or to the Court of Appeal, but if an appeal is taken to the High Court, no further appeal lies by either party to the Court of Appeal.

This does not, however, preclude an appeal to the Supreme Court of Canada, as in *Grand Trunk R.W. Co. v. Coupal*, 28 S.C.R. 531, or to the Privy Council: *Atlantic & N. W. R.W. Co. v. Wood*, (1895), A.C. 257.

In *Pontiac & Pacific R.W. Co. v. Sisters of Charity*, Q.R. 20 S.C., p. 257, it was held that on an appeal under this section no new evidence can be adduced, and no objection based, upon the admission of illegal evidence or the exclusion of legal evidence, can be considered, unless the illegalities appear on the record.

The award cannot be explained or varied by extrinsic evidence of the intention of the arbitrators.

Errors of law or fact, or excess of jurisdiction, must appear on the face of the award, or from the evidence or documents of record.

The court will not interfere with the discretion of the arbitrators as to amount of award, unless as a check on possible fraud, accidental error, or gross incompetence.

The award of costs by the arbitrators does not invalidate it, where it simply follows the rule established by the Railway Act.

Duke of Buccleuch v. Metropolitan Board of Works, 5 H.L. 418, followed.

There is no power under this section to refer an award back to the arbitrators, the provisions of sub-sec. 3 referring only to setting aside, not to referring back, awards.

Re McAlpine and Lake Erie, etc., R.W. Co., 3 O.L.R. 230.

See also *Re Grand Trunk R. W. Co. and Petrie*, 2 O.L.R. 284.

In *Re Horton and Canada Central R.W. Co.*, 45 U.C.R. 141, it was held that in the absence of any such provision as section 168 in the Railway Act of 1868, (31 Vict., cap. 28 D), there was no jurisdiction in the Court to set aside an award made under that Act.

In *Re Herring and Napanee & Tamworth R.W. Co.*, 5 O.R. 349, it was held, under 42 Vict., cap. 9 (D.), (Con. Ry. Act, 1879),

that the notices of appointment of arbitrator and appointment of third arbitrator might be made a Rule of Court under the Common Law Procedure Act, distinguishing *Re Credit Valley and Great Western*, 4 A.R. 532.

In that case the award was set aside on account of an offer made by the company to do certain things, which was delivered to the arbitrator for the company, and by him to the umpire, but not communicated to the land-owner until after the award was made, the award having been based in part upon such offer.

See for cases in which award held bad for want of certainty as to provision respecting right to cross track,

Great Western R.W. Co. v. Hunt, Dougall, and Dodds, 12 U.C.R. 124, *et seq.*

The arbitrators have no power to impose the payment of a rent or periodical sum by their award. The compensation fixed should be a gross sum capable of being paid at once to the parties, or into court, except in case of "corporations or persons "who cannot in common course of law sell or alienate the land." A direction in the award to the railway company to construct a culvert is not within the functions of the arbitrators.

Bourgoin v. Montreal, Ottawa. & Occidental R.W. Co., 5 App. Cas. 381.

To justify the court in setting aside an award, the sum awarded must be so grossly and scandalously inadequate as to shock one's sense of justice.

Benning v. Atlantic & North West R. W. Co., M.L.R. 5 S.C. 136, M.L.R. 6 Q.B. 385.

An omission to swear the arbitrators was held to invalidate the award.

Whitfield v. A. & N. W. Ry., 33 L.C.J. 25.

It was held in the Court of Appeal in

Beaudette v. North Shore R. W. Co., 11 Q.L.R. 239, that an award should be set aside where the arbitrators had failed to fix a day for making their award at their first meeting, as is now required by sec. 164, reversed in the Supreme Court, 15 S.C.R., 44.

An award will be set aside if rendered in the absence of any arbitrator, and without the two days' notice to him required by sec. 160.

See *Anglin v. Nickle*, 30 U.C.C.P. 72;

Nott v. Nott, 5 O.R. 283.

169. Upon payment or legal tender of the compensation or annual rent, so awarded or agreed upon, to the person entitled to receive the same, or upon the payment into court of the amount of such compensation, in the manner hereinafter mentioned, the award or agreement shall vest in the company the power forthwith to take possession of the lands, or to exercise the right, or to do the thing for which such compensation or annual rent has been awarded or agreed upon; and if any resistance or forcible opposition is made by any person to its so doing, the judge shall, on proof to his satisfaction of such award or agreement, issue his warrant to the sheriff of the district or county, or to a bailiff as he deems most suitable, to put down such resistance or opposition, and to put the company in possession; and the sheriff or bailiff shall take with him sufficient assistance for such purpose, and shall put down such resistance or opposition and put the company in possession. 51 V., c. 29, s. 162, Am.

When possession may be taken by company.

Where forcible resistance is offered.

Corresponds to and is identical with sec. 162 in the Act of 1888, except that the word "may," appearing after the word "judge" in the tenth line has been changed to "shall" in the present section, thus making the section imperative. Until the requirements of this section have been complied with, (unless a warrant has been granted under section 170), the entry of the company is premature and illegal.

Martini v. Gzowski, 13 U.C.R. 298.

In *Todd v. Meaford and Grand Trunk R.W. Co.*, 6 O.L.R. 469, the plaintiff having precluded himself by agreement from treating the railway company as trespassers,—held that his remedy against the company was by arbitration proceedings under the Railway Act, and not by action.

See also *Peterborough v. Grand Trunk R. W. Co.*, (1900), 32 O.R. 154; 1 O.L.R. 144.

As to persons to whom payment should be made, see sec. 152, *supra*, and notes thereon.

Warrant
for im-
mediate
possession in
certain
cases.

170. Such warrant shall also be granted by the judge without such award or agreement, on affidavit to his satisfaction that the immediate possession of the lands, or of the power to do the thing mentioned in the notice, is necessary to carry on some part of the railway with which the company is ready forthwith to proceed. 51 V., c. 29, s. 163, Am.

Corresponds to and is identical with sec. 163 in the Act of 1888, except that the word "may," appearing in the first line of that Act, has been changed to "shall" in the present section.

In *Canadian Pacific R. W. Co. v. Little Seminary of St. Thérèse*, 16 S.C.R. 606.

Paterson and Gwynne, J.J.S.C., were of opinion that the order for possession under this action could only be made when the land was required for immediate use, in carrying on some part of the railway with which the company is willing to proceed.

In *Kingston & Pembroke Ry. v. Murphy*, 11 P.R. 304, the order for possession was refused, because it was not clearly established that the company had an indisputable right to acquire the land by compulsory proceedings, and that there was some urgent and substantial need for immediate action.

Procedure
upon
applica-
tion for
such
warrant.

171. The judge shall not grant any warrant under the next preceding section, unless ten days' previous notice of the time and place when and where the application for such warrant is to be made has been served upon the owner of the land or the person empowered to convey the land, or interested in the land sought to be taken, or which may suffer damage from the taking of materials sought to be taken, or the exercise of the powers sought to be exercised, or the doing of the thing sought to be done, by the company; and unless the company gives security to his satisfaction, by deposit, in a chartered bank designated by him, to the credit of the company and such person or party jointly, of a sum in his estimation sufficient to cover the probable compensation and costs of the arbitration, and not less than fifty per cent. about the amount mentioned in the notice served under section 154. 51 V., c. 29, s. 164, Am.

Deposit
of com-
pensa-
tion.

Corresponds to section 164 in the Act of 1888, the only difference being in the provision as to amount to be deposited. The words, "of a sum in his estimation sufficient to cover the probable compensation and costs of the arbitration," having been substituted in the present section for the words "of a sum larger than his estimate of the probable compensation," appearing in the former Act.

No provision is made for service by advertisement as in section 158.

In re Ontario Tanners' Supply Co. and Ontario & Quebec R.W. Co., 12 P.R. 563, it was held that in the computation of the ten days' notice, the day of the service of the notice and the day of the return must both be excluded.

In *Jenkins v. Central Ontario R.W. Co.*, 4 O.R. 593, it was held that the High Court had jurisdiction to enjoin the taking of possession, notwithstanding the order of the County Court judge for immediate possession made under the Railway Act of Ontario, R.S.O. 1877, cap. 165, sec. 20, sub-sec. 23, if the company were making use of their powers to attain any object collateral to that for which it was incorporated; but otherwise it was not within the jurisdiction of the judge of the High Court to interfere with an Order of the County Court judge, though granted *ex parte*. By section 156 the County Court judge has practically the same jurisdiction as under the Ontario Act.

172. The costs of any such application to, and of any such hearing before, the judge, shall be borne by the company, unless the compensation awarded is not more than the company had offered to pay; and no part of such deposit or of any interest thereon shall be repaid, or paid to such company, or paid to such owner or party, without an order from the judge, which he may make in accordance with the terms of the award. 51 V., c. 29, s. 165. Costs of applica-
tion.
Payment.

Corresponds to and is identical with sec. 165 of the Act of 1888. Under the former section, where the amount awarded is not more than the amount offered by the company, it was decided that the owner must pay the costs of the application for the warrant.

Re Shibley and The Napanec, Tamworth, & Quebec R. W. Co., 13 P.R. 237.

In *Kingston & Pembroke R.W. Co. v. Murphy*, 11 P.R. 304, Boyd, C., dismissed the application for possession by the railway company, with costs in any event of the arbitration to the land-owner, but doubted his power to award costs directly under the statute.

In *Canadian Pacific R.W. Co. v. Little Seminary of St. Thérèse*, 16 S.C.R. 606, it was held by the majority of the Court that a judge making an order for payment out under this section acts as *persona designata*, and no appeal lies from his judgment.

Followed in *Re Toronto, Hamilton & Buffalo R.W. Co., and Hendrie*, 17 P.R. 199.

The owner is entitled to interest on the amount awarded him only at the rate allowed by the bank on the money paid in, and not at the legal rate.

Re Lea and Ontario & Quebec R.W. Co., 21 C.L.J. 154:

Re Taylor and Ontario & Quebec R.W. Co., 11 P.R. 371:

Re Philbrick and Ontario & Quebec R.W. Co., 11 P.R. 373.

Com-
pensa-
tion to
stand in
place of
the
land.

Encum-
brances.

173. The compensation for any lands which may be taken without the consent of the owner, shall stand in the stead of such lands; and any claim to or encumbrance upon the said lands, or any portion thereof, shall, as against the company, be converted into a claim to the compensation, or to a like proportion thereof; and the company shall be responsible accordingly, whenever it has paid such compensation or any part thereof, to a person not entitled to receive the same, saving always its recourse against such person. 51 V., c. 29, s. 166.

Corresponds to and is identical with sec. 166 in the Act of 1888, with the substitution of the word "owner" for the word "proprietor" in the second line. The meaning of this section is stated by Street, J., in *Young v. Midland R.W. Co.*, 16 O.R. at p. 740, to be that the estates in the land become estates in the compensation. Until the death of the tenant for life, the statute does not begin to run against those entitled to the reversion in fee.

Under this section it has been held that a mortgagee, not a party to the award, may adopt it and foreclose as to the compensation awarded. *Scottish American Inv. Co. v. Prittie*, 20 A.R. 398.

The right to recover compensation is statutory, and an action to enforce it, is not barred until twenty years after the cause of action arose *i.e.*, when the railway company entered on the land.

Ross v. G. T. R. W. Co., 10 O.R. 447;

Essery v. G. T. R. W. Co., 21 O.R. 224.

In the case of damage by the construction of an embankment, it was held that the action was barred by the lapse of six years.

Chaudiere, etc., Co. v. Canada Atlantic R. W. Co., 33 S.C.R. 11.

174. If the company has reason to fear any claim, mortgage, *hypothèque*, or encumbrance, or if any person to whom the compensation or annual rent, or any part thereof, is payable, refuses to execute the proper conveyance and guarantee, or if the person entitled to claim the same cannot be found, or is unknown to the company, or if, for any other reason, the company deems it advisable, the company may pay such compensation into court, with the interest thereon for six months, and may deliver to the clerk or prothonotary of such court an authentic copy of the conveyance, or of the award or agreement, if there is no conveyance; and such conveyance, or award or agreement shall thereafter be deemed to be the title of the company to the land therein mentioned. 51 V., c. 29, s. 167, Am.

2. Where the lands are situated elsewhere than in the province of Quebec, a notice, of such payment and delivery, in such form and for such time as the court appoints, shall be inserted in a newspaper, if there is any, published in the county in which the lands are situated, or if there is no newspaper published in the county, then in the official gazette of the province, and also in a newspaper published in the nearest county thereto in which a newspaper is published, which shall state that the title of the company(that is, the conveyance, agreement or award) is under this Act, and shall call upon all persons claiming an interest in or entitled to the lands, or any part thereof, to file their claims to the compensation, or any part thereof. 51 V., c. 29, s. 168, Am.

Payment of compensation into court in certain cases.

Notice of payment into court when land not in Quebec.

Proceedings.

Where
land
situated
in Quebec

3. Where the lands are situated in the province of Quebec, the notice shall be published as is required in cases of confirmation of title, and the registrar's certificate shall be procured and filed as in such cases. 51 V., c. 29, s. 170, Am.

Effect, of
land
adjudica-
tion.

4. All such claims filed shall be received and adjudicated upon by the court, and the adjudication thereon shall for ever bar all claims to the land, or any part thereof, including any dower, mortgage, *hypothèque* or encumbrance upon the same: and the court shall make such order for the distribution, payment or investment of the compensation, and for the security of the rights of all persons interested, as to right and justice, and to law appertains. 51 V., c. 29, s. 171, Am.

Costs.

5. The costs of the proceedings, in whole or in part, including the proper allowances to witnesses, shall be paid by the company, or by any other person, as the court orders, and if the order for distribution, payment, or investment is obtained in less than six months from the payment of the compensation into court, the court shall direct a proportionate part of the interest to be returned to the company; and if from any error, fault or neglect of the company, it is not obtained until after six months have expired, the court shall order the company to pay into court, as part of the compensation, the interest for such further period as is right. 51 V., c. 29, s. 172, Am.

Interest.

Corresponds to, and is a consolidation, with amendments, of sections 167, 168, 169, 170, 171, and 172 of the Act of 1888.

As to interest, the rule is thus laid down in *Rhys v. Dare Valley R.W. Co.*, 19 Eq. 93:

Interest is payable by a railway company upon the purchase money or compensation, from the time of their taking possession of the land under their statutory powers, not merely from the subsequent period when the compensation is ascertained.

Interest may also be allowed from the date when the right to compensation accrued, although no part of the lands have been taken.

Re Birely and Toronto, Hamilton & Buffalo R.W. Co., 28 O.R. 468.

Interest was allowed a mortgagee, constructively in possession of vacant lands, for about sixteen years, though no payment had been made;

Delaney v. Canadian Pacific R. W. Co., 21 O.R. 11;

Overruled by *McMicking v. Gibbons*, 24 A.R. 586.

In *Drummond Ry. Co. v. Oliver*, Q.R., 7 Q.B. 41,

it was held under sec. 167 of the former Act, corresponding to sub-sec. 1 of this section, that in order to authorize taking possession of the land expropriated, the railway company must deposit in court the amount of the award of the arbitrators, with interest for six months, and that default of their depositing the amount of the award without interest rendered the deposit insufficient, and the owner was held entitled to retake possession.

The judgment of the Court of Queen's Bench (Lacoste, C.J.) was based upon the necessity of a strict compliance with the provisions of this section.

The question of any additional interest payable by the company can only be adjudicated upon by the Court when the Order is obtained under sub-sec. 5, (sec. 172, Act of 1888).

Atlantic & North-West R.W. Co. v. Judah, 23 S.C.R. 231.

Payment of the compensation into Court under this section, would appear to be made at the risk of paying the owner's costs, if done unreasonably. *Harrison v. Alliance Assurance Co.* (1903), 1 K.B. 188, decided under the corresponding provision of the Life Assurance Companies Payment into Court Act, 1896, sec. 3, which provides that any Life Assurance Company may pay into the High Court . . . any moneys payable to them under a life policy in respect of which, in the opinion of the Board of Directors, no sufficient discharge can otherwise be obtained.

Branch Lines.

175. The company may for the purposes of its undertaking ^{Power to} construct, maintain and operate branch lines, not exceeding in ^{construct} any one case six miles in length, from the main line of the rail- ^{branch} lines. way or from any branch thereof. Before commencing to construct any such branch line the company shall obtain the authority of the Board and comply with the following provisions:—

Deposit
of plans
with re-
gistrars
of deeds.

2. The company shall make a plan, profile and book of reference, showing the proposed location of the branch line and conforming to the requirements of section 122, and shall deposit the same or such parts thereof as relate to each district or county through which the branch line is to pass, in the offices of the registrars of deeds for such districts or counties respectively.

Notice of
applica-
tion to
Board.

3. Upon such deposit, the company shall give four weeks' public notice of its intention to apply to the Board under this section, in some newspaper published in each county through which the branch line is to pass, or, if there should be no paper published in such county or counties, then for the same period in *The Canada Gazette*.

Pro-
cedure on
applica-
tion.

4. After the expiration of the notice the company shall submit to the Board, upon such application, a duplicate of the plan, profile and book of reference so deposited. The Board, if satisfied that the branch line is necessary in the public interest or for the purpose of giving increased facilities to business, and if satisfied with the location of such branch line, and the grades and curves as shown on such plan, profile and book of reference, may, in writing, authorize the construction of the branch line in accordance with such plan, profile and book of reference, or subject to such changes in location, grades and curves as the Board may direct; and such authority shall limit the time, not exceeding two years, within which the company shall construct and complete such branch line.

Limit of
time for
construc-
tion.

Deposit
of autho-
rity, etc.,
in regis-
try
offices.

5. There shall be deposited with the Board the authority, and the duplicate of such plan, profile and book of reference together with such papers and plans as are necessary to show and explain any changes directed by the Board, under the provisions of sub-section 4 of this section. The company shall deposit in the registry offices, mentioned in sub-section 2 of this section, copies, certified as such by the Secretary, of the authority, and of the papers and plans showing the changes directed by the Board.

6. Upon compliance with this section, all the provisions, ^{Application of Act.} except sections 123 and 124, of this Act, shall apply to the branch line so authorized and to the lands to be taken for such branch line.

7. No branch line shall be extended under the provisions of ^{No extension is allowed.} this section; nor shall any branch line be constructed so as to form in effect an extension of the railway beyond the termini mentioned in the Special Act.

8. Except with reference to branch lines authorized by the ^{Lapse of power inconsistent with this section. Saving.} Special Act to be constructed between any two points or places definitely fixed or named therein, no power to construct branch lines in any Special Act contained, inconsistent with the provisions of this section shall have any force or effect after three years from the passing of this Act. Nothing in this sub-section shall be deemed to take away or impair the rights or powers of any company under any contract with the Government of Canada, approved and ratified by a Special Act of the Parliament of Canada. Sub. for 51 V., c. 29, s. 121.

The former section incorporated in one long paragraph all the special provisions deemed to be necessary for the construction of branch lines. The particular purposes for which they might be constructed were designated in detail and the general words "for the purposes of its undertaking" have been substituted for the specific instances given in the previous enactment. The whole section should be read in conjunction with sec. 118 (*h*), *ante*, subsec. 118(*p*), *ante*, would no doubt be also applicable to this as to all other powers conferred by that section. The corresponding English provision is to be found in 8 Vict., cap. 20, sec. 76 (Imp.). Provisions similar to those contained in this section appeared in earlier railway consolidations: See R.S.C., cap. 109, sec. 45; and 42 Vict., cap. 9, secs. 7 (18) and 100, but by these earlier acts these provisions were, of course, subject to the powers conferred upon railways and by sec. 6(7) of R.S.C. 109, and sec. 7 (2) of 42 Vict., the privilege was limited to cases in which power to make branch railways was conferred by the special act.

Any railway subject to the jurisdiction of the Federal Parliament may now make branch railways where necessary for the purposes of its undertaking. Such cases as *Murphy v. Kingston, etc., R.W. Co.*, 11 O.R. 302, and 582, and 17 S.C.R. 582, and *Re Bronson & Ottawa*, 1 O.R. 415, must therefore be read in the light of the changes which were made in 1888 and 1903, *supra*. Apart from the express provisions of sub-section 7, it would still appear from *Murphy v. Kingston, etc., R.W. Co.* that a railway company could not under pretence of constructing a branch railway extend its main line for six miles beyond the terminus fixed by its act of incorporation; unless it is empowered to do so by its special act: *Canadian Pacific R.W. Co. v. Major*, 13 S.C.R. 233. See also *Vancouver v. Canadian Pacific R.W. Co.*, 2 B.C.R. 315, 23 S.C.R. 1. The special powers conferred upon the Canadian Pacific Railway Company to make branch lines under the contract with the Government ratified by 44 Vict., cap. 1 (D.), appear to be expressly saved by the latter part of sub-section 8. Where a railway company has complied with all the provisions of the statute respecting branch lines it may proceed with the expropriation of the land required in the same manner as it is authorized to do in the construction of its main line: *Todd v. Meaford*, 6 O.L.R. 469. For an instance of breach of contract with a town to construct a branch line see *Re Barrie and Northern R.W. Co.*, 22 U.C.R. 25.

Branch lines to industry within 6 miles of railway may be ordered by Board.

176. Where the owner of any industry established, or intended to be established, within six miles of the railway, is desirous of obtaining railway facilities in connection therewith, but cannot agree with the company as to the construction and operation of a spur or branch line from the railway thereto, the Board may, on the application of such owner, and upon being satisfied of the necessity for such spur or branch line in the interests of trade, order the company to construct, maintain and operate such branch line or spur, and may direct such owner to deposit in some chartered bank such sum or sums as are by the Board deemed sufficient, or are by it found to be necessary to defray all expenses of constructing and completing the spur or branch line in good working order, including the cost of the right of way,

Deposit to be made by owner of industry.

incidental expenses and damages; and the amount so deposited shall, from time to time, be paid to the company upon the order of the Board, as the work progresses.

Pay-
ments
there-
from to
company.

2. The aggregate amount so paid by the owner in the construction and completion of the said spur or branch line shall be repaid or refunded to the owner by the company by way of rebate, to be determined and fixed by the Board, out of or in proportion to the tolls charged by the company in respect of the carriage of traffic for the owner over the said spur or branch line; and until so repaid or refunded, the owner shall have a special lien therefor, upon such branch line, to be reimbursed by rebate as aforesaid.

Owner
to be
refunded
by rebate
on tolls.

Owner's
lien
until re-
imbursed.

3. Upon repayment by the company to such owner of all payments made by the owner upon such construction, the said spur or branch line, right of way, and equipment shall become the absolute property of the company free from any such lien.

Dis-
charge of
lien.

4. The operation and maintenance of the said spur or branch line, by the company, shall be subject to and in accordance with such order as the Board makes with respect thereto, having due regard to the requirements of the traffic thereon and to the safety of the public and of the employees of the company.

Opera-
tion of
branch to
be regu-
lated by
Board.

5. All the provisions of this Act respecting the construction of spur or branch lines shall apply to any spur or branch line constructed under this section.

Pro-
visions
applicable.

This section is new and embodies in statutory form a practice which had been frequently adopted by railway companies who, where there is a prospect of obtaining business from some industry adjoining their line, have been in the habit of building sidings or branch lines to the factory or industry and for this purpose exercising their statutory powers of expropriation, etc., upon receiving from the owners an amount sufficient to defray the cost of building the siding or branch; the expense to be repaid to the owner by allowing a rebate upon the freight charges due in re-

spect of every car of freight shipped in or out upon the siding. The rebate being in sums of one or two dollars. An inducement to railway companies to enter into such voluntary arrangements has frequently been an undertaking to route all freight as far as possible over its line in preference to the lines of other companies who are not parties to granting the facilities. As is shown by the recitals in 3 & 4 Vict., cap. 97, sec. 18 (Imp.), the practice was to require railway companies in their special acts to permit individuals to connect branch lines built at their own expense with the railway's main line and in case of dispute the matter was to be decided by the Board of Trade: *ibid.* secs. 3 and 19, and 5 & 6 Vict., cap. 55, sec. 12. The matter is now provided for in England by 8 Vict., cap. 20, sec. 70 (Imp.), which permits the owners of property to lay lines of railway down upon their own lands and lands of others whose consent they can obtain and compels railway companies to make openings in their main line and permit a junction with a branch line so constructed subject to certain restrictions therein set out. It has been decided under the English Act that these provisions are not confined to the time at which the railway is constructing its line, but apply from time to time thereafter as occasion may require: *Monkland v. Kirkintilloch R.W. Co.*, 3 R.C. 273; *Bishop v. North*, *ibid.* 459, 11 M. & W. 418; that where a company has consented to an opening even by parol they cannot afterwards revoke their consent: *Bell v. Midland R.W. Co.*, 3 DeG. & J. 673; that where a company took up a connection already made without consent they must replace it at their own expense: *Portway v. Colne, etc., R.W. Co.*, 7 Ry. & Canal Cases 102, and that where old fashioned switches appropriate at the time have been installed and long used the railway company if it wishes to instal improved appliances must do so at its own expense: *Woodruff v. Lancashire, etc., R.W. Co.*, 28 Ch.D. 190. In *Lancashire Brick, etc., Co. v. Lancashire, etc., R.W. Co.* (1902), 1 K.B. 381, 651, it was decided under the English Act that the plaintiffs could not compel defendants to make the junction where, owing to a heavy grade and the state of business at the point suggested for making the junction, there were either structural difficulties in making an opening or difficulties would arise in working the traffic upon the railway. It will be observed that the Act empowers the Board to do what the court will not do, namely, supervise the construction and maintenance and operation of a railway: *Kingston v. Kingston, etc., R.W. Co.*, 28 O.R.

399, 25 A.R. 462, and see 1 Can. Ry. Cas. 296; but it may perhaps be said that the Board has machinery for enforcing a decree to build a siding that the court has not; though what is to happen if a railway does not obey the order of the Board is not clear. Section 294, *infra*, provides *inter alia* that where a company refuses to obey an order of the Board it is to be liable in damages to any person aggrieved and to certain penalties therein prescribed.

Crossings and Junctions.

177. The railway lines or tracks of any company shall not be crossed or joined by or with the railway lines or tracks of any other company until leave therefor has been obtained from the Board as hereinafter provided. 56 V., s. 27, s. 1, Am.

Railway
crossings
and
junctions
Power
of the
Board.

Compare 8 Vict., cap. 20, sec. 16 (Imp.). The general power to cross or join other railways is conferred by section 118 (*c*), *ante*. The former provisions are to be found in sections 173 to 177 of 51 Vict., cap. 29, sec. 173, having been first amended by 55 & 56 Vict., cap. 27, sec. 5, and afterwards by 56 Vict., cap. 27, sec. 1. For provisions regulating the precautions to be taken at crossings and the rate of speed on approaching them see secs. 225 and 226, *infra*. This is one of the sections which by section 7, *ante*, applies to steam, electric or street railways which are seeking to cross a railway already located and for the purposes of deciding upon the desirability of effecting a crossing they are all to be deemed works for the general advantage of Canada. In *Grand Trunk R.W. Co. v. Hamilton, etc., R.W. Co.*, 29 O.R. 143, it was held that the corresponding provisions of the earlier act were *intra vires* of the Dominion Parliament and that a crossing might be made at rail level where permitted by the Railway Committee, although such crossings were expressly forbidden in the Ontario Statute incorporating the company which desired to cross. In the earliest Canadian Railway Act, 14 & 15 Vict., cap. 51, sec. 9, the provision for crossing required the appointment of an arbitrator to determine the place and manner of crossing and the compensation to be paid, and such cases as *Buffalo, etc., R.W. Co. v. Great Western R.W. Co.*, 2 P.R. 88, and 14 U.C.R. 397, were decided upon that section, but the present enactment leaves all these matters to the Board and prescribes the terms upon which a crossing is to be made.

Approval and Jurisdiction of the Board. The provisions requiring the approval of the proper authority are passed in the interests of the public and such approval cannot be waived by agreement between the companies. It is also a condition precedent to the exercise of the right of crossing and any attempt to cross before such approval has been obtained will be restrained by injunction: *Credit Valley R.W. Co. v. Great Western R.W. Co.*, 25 Gr. 507. For the principles upon which the court will grant an interim injunction see *Grand Trunk R.W. Co. v. Credit Valley R.W. Co.*, 26 Gr. 572. Nor will the authority of a provincial legislature to cross a Dominion railway take the place of an order of the Board: *Canadian Pacific R.W. Co. v. Northern, etc., R.W. Co.*, 5 Man. L.R. 301; and this order should not only be applied for, but obtained before the work is begun: *ibid.* The order of the Board allowing a crossing will not confer power upon a company to take private lands or a portion of a highway for the purpose of laying such tracks as are required unless the other steps required for the expropriation of lands or the use of a part of the highway are also taken: *City of Toronto v. Metropolitan R.W. Co.*, 1 Can. Ry. Cas. 63.

The order of the Board must accurately describe the lands over which the crossing is to be made, and if the lands are misdescribed the crossing company will be enjoined from proceeding with the intersection, provided for by the order: *Grand Trunk R.W. Co. v. Lindsay, etc., R.W. Co.*, 3 Can. Ry. Cases 174.

Pro-
ceedings
on ap-
plication
to Board.

2. Upon any application for such leave the applicant company shall submit to the Board a plan and profile of such crossing or junction, and such other plans, drawings and specifications as the Board may in any case, or by regulation, require.

Order of
Board.

The Board may by order grant such application on such terms as to protection and safety as it may deem expedient, may change the plan and profile, drawings and specifications, so submitted and fix the place and mode of crossing or junction, and may direct that the lines and tracks of one company be carried over or under the lines and tracks of the other, and that such works, structures, equipment, appliances and materials be constructed, provided, installed, maintained, used or operated, watchmen or

other persons employed, and measures taken, as under the circumstances appear to the Board best adapted to remove and prevent all danger of accident, injury or damage, and may determine the amount of damage and compensation, if any, to be paid for any property or land taken or injuriously affected by reason of the construction of such works.

Compare 51 Vict., cap. 29, secs. 173, 174, 175 and 176.

This sub-section provides in detail for the nature of the supervision which the Board is to exercise and provides also for payment of compensation for lands taken or injuriously affected or damage done by reason of the construction of the crossing. Presumably the compensation would be fixed according to the principles outlined in the notes to section 120, *ante*. The principles upon which compensation should be allowed were discussed in argument in *Re Credit Valley and Great Western R.W. Cos.*, 4 A.R. 532, but were not laid down in the judgment. It will be noted that this section does not deal with the actual taking of the land required for the crossing, but only with the place and mode thereof. The power to take the land of another railway company for the purpose of making a crossing is given by section 137, *ante*. Before any crossing could be made the provisions of this latter section would also have to be complied with: *Grand Trunk R.W. Co. v. Lindsay, etc., R.W. Co.*, *supra*. Without express legislative sanction it is at least doubtful whether one railway company could expropriate lands of another railway or public body which had been acquired for a specific purpose presumably in the interest of the public and which have thereby become impressed with a public trust: *Re Bronson & Ottawa*, 1 O.R. 415. While by this sub-section power is given to fix the amount of compensation to be paid for taking and injuring the lands of the railway to be crossed there is no power as in section 176 of 51 Vict., cap. 29, to apportion or provide for the expense of installing and maintaining the crossing appliances and such safeguards as the Board may require. Probably this power may be inferred from the wide terms of the section, but its omission would seem to be due to inadvertence. As a matter of practice the general rule has been that any company desiring to cross another's tracks must pay the expenses of installing and maintaining the appliances approved by the now extinct Railway Com-

mittee. This general rule, of course, gave way to exceptions which sometimes arose as, for instance, where an overhead or under crossing was ordered without being absolutely necessary, but was a matter as much of convenience as necessity.

Super-
vision of
works.

3. The Board may give directions as to supervision of the construction of the works, and order that detailed plans, drawings and specifications of any works, structures, equipment or appliances required, shall, before construction or installation, be submitted to and approved by the Board.

Order
authoriz-
ing
opera-
tion.

4. No trains shall be operated on the lines or tracks of the applicant company over, upon or through such crossing or junction until the Board grants an order authorizing such operation, but the Board shall not grant such order until satisfied that its orders and directions have been carried out, and that the provisions of this section have been complied with. 51 V., c. 29, s. 174, Am.

Safety
applian-
ces on
rail-level
cross-
ings.

178. The Board may order any company to adopt and put in use at any such crossing or junction, at rail level, such interlocking switch, derailing device, signal system, equipments, appliances and materials, as in the opinion of the Board renders it safe for engines and trains to pass over such crossing or junction without being brought to a stop. 51 V., c. 29, s. 175, Am.

The advantage of inserting an interlocking appliance is that where it has received the approval of the Board trains may, under section 227, *infra*, pass over the crossing without stopping as in the case of an ordinary level crossing.

Navigable Waters.

Naviga-
tion not
to be ob-
structed.

179. No company shall cause any obstruction in, or impede, the free navigation of any river, water, stream or canal, to, upon, along, over, under, through or across which its railway is carried. 51 V., c. 29, s. 178, Am.

The power to cross navigable waters is given by sec. 118, subsecs. (k) and (l), *ante*. The exercise of this power is, of course, subject to sections 179 to 183. For similar English provisions see 8 Viet., cap. 20, secs. 16 and 17, and 26 & 27 Viet., cap. 92, secs. 13 to 15 (Imp.). A navigable river is, for the purposes of navigation, a highway and the principles governing the use of a highway by the public are largely applicable to the user of navigable waters. The subject has been dealt with at length in such cases as *Reg. v. Betts*, 16 Q.B. 1022; *Attorney-General v. Johnson*, 2 Wilson C.C. 87; *Attorney-General v. Lonsdale*, L.R. 7 Eq. 377, at p. 389; *Drake v. Sault Ste. Marie Pulp Co.*, 25 A.R. 251. So far as interference with navigable waters constitutes a nuisance to the public it is properly the subject of indictment or information, but where in addition any private individual can show that he suffers a special damage different from that suffered by the public at large it may also be the subject of a civil action: *Attorney-General v. Lonsdale*; *Drake v. Sault Ste. Marie, etc., Co.*, *supra*. And the same rule applies in Quebec: *Bell v. Quebec*, 5 A.C. 84.

The right of access to the waterway from riparian lands is a private right which the owner of the land enjoys *qua* owner; such right is analogous to the "droits d'accès et de sortie" recognized by the French law: *Bell v. Quebec*, *supra*; *Lyon v. Fishmongers*, 1 A.C. 662; *Attorney-General v. Conservators, etc.*, 1 H. & M. 1. But this right of access is distinct from the right of navigation which a riparian proprietor may have upon the river in common with others and whether this is a private right for which an action of damages will lie or compensation under the act was not determined by these cases and it was said to be open in *Bell v. Quebec*. Where for a large part of the year the river is the only means of access then at least the riparian proprietor would be entitled to his private right of action under the *Drake Case*. The case of *Crandell v. Mooney*, 23 U.C.C.P. 212, went further and held that the plaintiff, a steam boat owner, who was prevented from plying his trade or calling by obstructions in a river, had a private right of action, relying for this upon *Winterbottom v. Lord Derby*, L.R. 2 Ex. 316; and *Ross v. Miles*, 4 M. & S. 101. The general subject was much discussed in *Caldwell v. McLaren*, 9 A.C. 392, reversing *McLaren v. Caldwell*, 5 A.R. 363, 8 S.C.R. 435, and overruling *Boale v. Dickson*, 13 U.C.C.P. 337.

The case of *Bell v. Quebec, supra*, further decided that whether an obstruction amounts to an interference with a riparian proprietor's access to his frontage is a question of fact to be determined by the circumstances of each case and the rights of riparian proprietors in this respect are said to be the same under both English and French law: *Miner v. Gilmour*, 12 Moore P.C. 131. The construction of a railway upon the foreshore of a navigable river thereby obstructing the owner's access to the water gives him a right of action or a right to compensation as the case may be even though the company leaves openings therein which would enable him to reach the water: *North Shore R.W. Co. v. Pion*, 14 A.C. 612; *Bigaouette v. North Shore R.W. Co.*, 17 S.C.R. 363; and the same result follows where a riparian owner's access to the sea is cut off: *Reg. v. Rynd*, 16 Ir. C.L. 29. Where a railway company caused the river to swell by the construction of its bridge thereby damaging the plaintiff's bridge by reason of flood, it was held that a right of action accrued, but as the damage was done "by reason of a railway" the plaintiffs were limited to one year within which to bring their action under sec. 287 of the previous Railway Act: *Tingwick v. Grand Trunk R.W. Co.*, 3 Q.L.R. 111; but where a company acting lawfully in pursuance of statutory powers and without negligence caused damage by the bursting of a boom, it was held in Ontario that it was not liable therefor: *Langstaff v. McRae*, 22 O.R. 78; where, however, damage is continued for a considerable period as by obstructing free navigation of the stream the time begins to run from the date when the damage has ceased: *Snure v. Great Western R.W. Co.* (1856), 13 U.C.R. 376. It is no defence to a railway company to say that it has impeded navigation as little as possible consistently with the execution of its works unless, of course, the statute permits an obstruction: *ibid.*

In *Small v. Grand Trunk R.W. Co.*, 15 U.C.R. 283, the general rule is repeated that the plaintiff must show some injury peculiar to himself such as impeding him in carrying on his trade or business before he can maintain a civil action for an obstruction. It is also laid down in that case that it is a question of fact for a jury whether the river is navigable or not. Where a statute authorizing the construction of a bridge across navigable waters prescribes the method by which compensation is to be obtained that method must be followed and the person injured cannot bring an action for his damages: *St. Andrews Church v.*

Great Western R.W. Co. (1862), 12 U.C.C.P. 399, and a writ of mandamus to proceed according to statute to fix compensation for damages caused by the erection of a bridge was granted where the company had refused to comply with the statutory requirements for ascertaining the compensation to be paid: *Reg. v. Great Western R.W. Co.*, 14 U.C.C.P. 462. Where a bridge already erected over a canal had been referred to by various Acts of Parliament, it was held that it might be assumed from these statutory references to it that it was lawfully placed at that point, even though it could not be proved that it had been authorized by the Governor-in-Council under the Railway Act, C.S.C., cap. 66, secs. 137 and 138; *Desjardins Canal Co. v. Great Western R.W. Co.*, 27 U.C.R. 363. For notes on the construction of bridges see secs. 292, *et seq.*, *infra*, and on the subject of interference with water courses not navigable and of flooding lands see secs. 196 and 197 and notes, *infra*.

180. No company shall run its trains over any canal, or over any navigable water, without having first laid, and without maintaining, such proper flooring under and on both sides of its railway track over such canal or water, as is deemed by the Board sufficient to prevent anything falling from the railway into such canal or water, or upon the boats, vessels, craft, or persons navigating such canal or water. 51 V., c. 29, s. 180, Am.

Bridges
to be
properly
floored.

181. Whenever the railway is, or is proposed to be, carried over any navigable water or canal by means of a bridge, the Board may by order in any case, or by regulations, direct that such bridge shall be constructed with such span or spans of such headway and waterway, and with such opening span or spans (if any), as to the Board may seem expedient for the proper protection of navigation, and, if any such bridge is a draw or swing bridge, when, under what conditions and circumstances, and subject to what precautions, the same shall be opened and closed. 51 V., c. 29, s. 179, Am.

Spans of
headway
and
water-
way of
bridges.

Where under a previous similar enactment a swing bridge was erected over a canal, it was held that if the requirements of railway traffic required that the bridge be kept closed tempor-

arily and notice was given to an approaching vessel of this fact, the railway company was not bound to open the bridge immediately upon the vessel's approach and were not liable for injury caused by the latter running into it: *Turner v. Great Western R.W. Co.*, 6 U.C.C.P. 536, and see *Desjardins Canal Co. v. Great Western R.W. Co.*, 27 U.C.R. 363; and where a plaintiff sought to have a swing bridge substituted for a fixed one, but a statute had been passed enabling the Railway Commissioners to deal with such matters, it was held that any change in the character of the bridge was a proper subject for the Commissioners and not for the courts, and that in any case such a change could not be enforced in a civil action brought by the private individual, but only by the Attorney-General acting on behalf of the public: *Cull v. Grand Trunk R.W. Co.*, 10 Gr. 491.

Pro-
ceedings
for con-
struction
of works
in navig-
able
waters.

182. When the company is desirous of constructing any wharf, bridge, tunnel, pier or other structure or work in, upon, over, under, through, or across any navigable water or canal, or upon the beach, bed or lands covered with the waters thereof, the company shall before the commencement of any such work, comply with the following provisions:—

Approval
of site
and
general
plan by
Governor
in
Council.

2. The company shall, in the case of navigable water, not a canal, submit to the Minister of Public Works, and in the case of a canal to the Minister, a plan and description of the proposed site for such work and a general plan of the work to be constructed, to the satisfaction of such Minister, for a recommendation to the Governor-in-Council for approval.

Order of
Board
for con-
struction.

3. Upon approval by the Governor-in-Council of such site and plans, the company shall apply to the Board for an order authorizing the construction of the work, and with such application shall transmit to the Board a certified copy of the Order-in-Council and of the plans and description approved thereby, and also detail plans and profiles of the proposed work, and such other plans, drawings and specifications as the Board may in any such case, or by regulation, require.

Detail
plans.

4. No deviation from the site or plans approved by the Governor-in-Council, shall be made without the consent of the Governor-in-Council. No deviation.

5. Upon any such application, the Board may make such order in regard to the construction of such work upon such terms and conditions as it may deem expedient, may make alterations in the detail plans, profiles, drawings and specifications so submitted, may in or by such order give directions respecting the supervision of any such works, and may require that such other works, structures, equipments, appliances and materials be provided, constructed, maintained, used and operated, and measures taken, as under the circumstances of each case may appear to the Board best adapted for securing the protection, safety and convenience of the public. What order may contain.

6. Upon such order being granted the company shall be authorized to construct such work in accordance therewith. When company authorized to construct work.

7. Upon the completion of any such work the company shall, before using or operating the same, apply to the Board for an order authorizing such use or operation, and, if the Board is satisfied that its orders and directions have been carried out, and that such work may be used or operated without danger to the public, and that the provisions of this section have been complied with, the Board may grant such order. 51 V., c. 29, s. 181, Am. Order of Board for use and operation after completion of work.

These provisions are much more elaborate than those of section 181 of the Act of 1888. It will be noted that not only must the orders of the Board be obtained, but plans must be submitted to the Minister having charge of the canal or of the navigable water and must be approved of by the Governor-General-in-Council upon the recommendation of that Minister. Under the former section the approval of the Railway Committee of the Privy Council was all that was required.

Con-
struc-
tion or
substitu-
tion of
partic-
ular
form of
bridge.

Penalty.

183. The Governor-in-Council may, upon the report of the Board, authorize or require any company to construct fixed and permanent bridges, or swing, draw or movable bridges, or to substitute any of such bridges for existing bridges on the line of its railway, within such time as the Governor in Council directs; and for every day after the period so fixed during which the company fails to comply with the directions of the Governor in Council, it shall forfeit and pay to His Majesty the sum of two hundred dollars; and no company shall substitute any swing, draw or movable bridge for any fixed or permanent bridge already built and constructed without the previous consent of the Governor in Council. 51 V., c. 29, s. 182, Am.

This section has been amended, not only by substituting the word "Board" for the words "Railway Committee," but also by requiring that the substitution of a swing, draw or movable bridge for a fixed or permanent bridge must first receive the consent of the Governor-in-Council. It was formerly sufficient to obtain the consent of the Railway Committee.

Highway Crossings.

Railway
on high-
way.

184. The railway may be carried upon, along or across an existing highway upon leave therefor having been first obtained from the Board as hereinafter provided, but the Board shall not grant leave to any company to carry any street railway or tramway, or any railway operated or to be operated as a street railway or tramway, along any highway which is within the limits of any city or incorporated town, until the company has first obtained consent therefor by a by-law of the municipal authority of such city or incorporated town.

Compare 8 Vict., cap. 20, sec. 4 and 7 (Imp.), 26 & 27 Vict., cap. 92 (Imp.).

This section has been altered and enlarged. By the former section the consent of a municipality was not required in any case, but now in cases of railways designed to operate on streets such consent must be obtained and this consent must be by by-law. In *Liverpool v. Liverpool, etc., R.W. Co.*, 35 N.S.R. 233, reversed

in the Supreme Court 3 Can. Ry. Cas. 80, it was held under a somewhat similar section that a mere resolution of council would not take the place of a by-law under seal, and though by section 2(b) the word "by-law" includes a resolution, this is expressly limited to by-laws of the company. Under former statutes it had been decided that a by-law was not necessary: *Pembroke v. Canada Central R.W. Co.*, 3 O.R. 303; and in *Lett v. St. Lawrence, etc., R.W. Co.*, 1 O.R. 545, Hagarty, C.J., thought that acquiescence in a track placed upon a highway might be assumed from the length of time during which it had existed, but Armour, J., considered that if illegally laid down no acquiescence except by by-law could make it rightful as against a person injured. "Highways" are defined by section 2(i), *supra*, and under *Gloucester v. Canada Atlantic R.W. Co.*, 1 Can. Ry. Cas. 327, 334, this definition was held to include an unopened road allowance. This and succeeding sections should also be read with section 118, sub-sections (k) and (l), *supra*, which confer power upon a railway company to construct its works upon, across and over any highway, etc., or to temporarily or permanently divert it.

Constitutionality. The soil in highways in Canada is generally vested in the Crown and this means in the Provinces in whom also resides the general power of legislation respecting them under sub-sections 8 and 10 of section 91 of the B.N.A. Act: *Re Trent Valley Canal*, 11 O.R. 687, at p. 696, and the power to regulate highways and the possession of them are generally vested by the provincial legislatures in the municipalities, see, for instance, 3 Edw. VII., cap. 19 (Ont.), secs. 598 to 636; but even the Crown could not without legislative sanction, stop up, obstruct or permit a nuisance upon a highway: *Reg. v. Hunt*, 16 U.C.C.P. 145, 17 U.C.C.P. 443; *Nash v. Glover*, 24 Gr. 219; nor can a municipality by virtue of its ordinary powers confer a franchise or right to make an onerous use of the highway upon individuals or a corporation: *Re Toronto and Toronto Street R.W. Co.*, 22 O.R. 374, at p. 396; *Davis v. New York*, 14 N.Y. 506; or authorize or itself create a nuisance upon it unless the legislature has expressly conferred such a power: *Cline v. Cornwall*, 21 Gr. 129; *Re Toronto and Toronto Street R.W. Co.*, *supra*. As railways on highways have been held to be a nuisance and subject to indictment unless parliamentary sanction has been obtained (*Reg. v. Charlesworth*, 16 Q.B. 1012; *Reg. v. Longton Gas*

Co., 2 E. & E. 651; *Sadler v. South Staffordshire, etc., R.W. Co.*, 23 Q.B.D. 17; *Magee v. London, etc., R.W. Co.*, 6 Gr. 170; *Robertson v. Halifax Coal Co.*, 20 N.S.R. 517), it follows that there must be some power in the Dominion Parliament to authorize the partial occupation of a highway by railways or otherwise such occupation would be illegal. This power is to be found in section 91, sub-section 10 of the B.N.A. Act, which empowers Parliament to legislate in respect of railways declared to be for the general advantage of Canada or of two or more provinces. Where this is the case Parliament has jurisdiction even over matters which otherwise would be subject only to provincial legislation: *Lefroy Legislative Power in Canada* 393; *Re Canadian Pacific R.W. Co. and York*, 1 Can. Ry. Cas. 36 and 47, per Sir George Burton, at page 52.

Where Parliament or a legislature having the necessary constitutional power, authorized an interference with the streets of a municipality its right is supreme and the municipality cannot object even though there is no provision for supervision of the works by it and no provision for compensation: *Standard Light, etc., Co. v. Montreal*, Q.R. 10 S.C. 209, 5 Q.B. 558; *Cleveland v. Melbourne*, 26 L.C. Jr. 1; *Bell v. Westmount*, Q.R. 15 S.C. 580, nor need it obtain the consent of other companies or individuals who may be affected or injured: *Bristol, etc., Co. v. National Telephone Co.* (1899), 2 Ch. 283.

Statutory Requirements. Until a railway company has fulfilled all statutory requirements, it cannot enter upon highways or run its trains over it: *West v. Parkdale*, 7 O.R. 270, 8 O.R. 59, 12 A.R. 393, 12 S.C.R. 250; *Parkdale v. West*, 12 A.C. 602, and the fact that no appreciable injury will result is no excuse for non-compliance with this general rule: *Attorney-General v. London, etc., R.W. Co.* (1899), 1 Q.B. 72, (1900), 1 Q.B. 78, but when all preliminaries have been observed the company is not responsible for any damages to individuals which may result unless it appear from the terms of the statute that compensation is to be paid: *Casgrain v. Atlantic, etc., R.W. Co.*, (1895) A.C. 282. The following requirements are laid down in the present Act:—

1. By section 119, *ante*, the company must restore the highway as nearly as possible to its former state or put it in such a state as not materially to impair its usefulness.

2. By section 120 it must do as little damage as possible and make full compensation “in the manner prescribed herein” for all damage.

3. By the present section it must obtain leave from the Board.
4. And, in cases where it is to operate as a street railway, of the municipality.
5. It must turn the highway during the works as provided by sub-section 2, *infra*.
6. The top of the rail must not be more than one inch above or below any highway which it crosses on the level.
7. Plans and profiles of the proposed crossing must be filed and approved by the Board: section 186.
8. Any highway crossed by an overhead track must comply with section 188.
9. Any highway carried over a railway must comply with section 189.
10. The slope of approaches to crossings must not exceed one foot in twenty without leave of the Board and must be fenced; section 190.
11. Signboards must be placed as prescribed by section 191.
12. Trains in approaching level crossings must ring a bell or sound a whistle at least 80 rods before reaching it; section 224.
13. Trains passing through thickly peopled localities must not exceed ten miles an hour unless the track is fenced in the manner prescribed by the Act; section 227.
14. Trains moving reversely over a highway in cities, towns or villages must have a person stationed at the foremost part of the train; section 228.
15. Trains must not stand on crossings more than five minutes without being cut; section 229.

Supervision. It should be noted that where work is to be done on highways subject to the supervision of some municipal officer the latter cannot by his approval waive compliance with statutory requirements: *Joyce v. Halifax Street R.W. Co.*, 24 N.S.R. 113, 22 S.C.R. 258; *Bonn v. Bell Telephone Co.*, 20 O.R. 696.

Compensation. As the soil and freehold in highways are vested in the Crown in the right of the province (*Re Trent Valley Canal*, 11 O.R. 687, at p. 696) a municipality would have no right to compensation for the value of the land occupied by a railway company: *Canada Atlantic R.W. Co. v. Ottawa*, 1 Can.

Ry. Cas. 298, 305; and though they may have a property in the materials composing the roadway they cannot in the absence of express enactment claim payment for such as has been interfered with or actually removed: *Sidney v. Young*, (1898) A.C. 457, nor can they claim to be indemnified because the railway works render it more difficult to reach a sewer that may have been beneath them: *Birkenhead v. London, etc., R.W. Co.*, 15 Q.B.D. 572; where, however, a railway company without lawful authority removes gravel from a road allowance it may be sued for the trespass committed: *Brock v. Toronto, etc., R.W. Co.*, 37 U.C.R. 372. Cited in *Louise v. Canadian Pacific R.W. Co.*, 3 Can. Ry. Cas. 65. For a discussion of the subject of compensation to individuals see notes to section 186, sub-section 2, *infra*.

Who May Sue or Indict—Attorney-General. Where a company is proceeding to cross a highway without lawful authority the Attorney-General acting on behalf of the public is the proper person to take action to restrain the nuisance thereby created: *Attorney-General v. London, etc., R.W. Co.* (1899), 1 Q.B. 72, (1900), 1 Q.B. 78; *Regina v. Grand Trunk R.W. Co.*, 15 U.C.R. 121; *Joyce v. Halifax Street R.W. Co.*, 24 N.S.R. 113; *Attorney-General v. Toronto Street R.W. Co.*, 14 Gr. 673.

The Municipality. A municipality by virtue of its control of streets has apparently a general right to restrain any company illegally seeking to occupy them: *Joyce v. Halifax Street R.W. Co.*, *supra*, and would also be entitled to a declaration as to whether that company had any right to obstruct or occupy them: *Gooderham v. Toronto*, 21 O.R. 120, 19 A.R. 641; *Toronto v. Lorsch*, 24 O.R. 227; *Gloucester v. Canada Atlantic R.W. Co.*, 1 Can. Ry. Cas. 327, 334, and this is especially the case where the railway has entered into an agreement with a municipality which has been confirmed by statute, as to the manner in which the streets shall be occupied. In fact in such a case it has been held that though an information by the Attorney-General to enforce the statutory restrictions was proper, yet the municipality was a necessary party: *Attorney-General v. Toronto Street R.W. Co.*, 14 Gr. 673, and see 15 Gr. 187. In *Fenelon Falls v. Victoria R.W. Co.*, 29 Gr. 4, it was laid down that by virtue of the Municipal Act there is such power of management control, etc., bestowed upon municipalities and such a responsibility cast upon them as to justify them in intervening on behalf of the inhabitants for the preservation of their rights.

Individuals. The right of individuals to recover damages or compensation is dealt with under section 186 (2), *infra*. It will be sufficient here to say that an individual may apply for an injunction for failure to comply with statutory requirements where he can show an injury peculiar to himself: *Hendrie v. Toronto, etc., R.W. Co.*, 26 O.R. 667, 27 O.R. 46, or he may recover damages for injuries so sustained: *Sibbald v. Grand Trunk R.W. Co.*, 19 O.R. 164, 18 A.R. 184, 20 S.C.R. 259; *West v. Parkdale, supra*; *Brodeur v. Roxton Falls*, 11 R. L. 447; *Whitfield v. Atlantic, etc., R.W. Co.*, 33 L.C.J. 24.

Opening Highways Across Railways. If a railway has constructed its line across an unopened road allowance the municipality can compel it to remove its fence so that the road may be opened up; and it is not necessary that a by-law to do this should be passed, a mere direction to the proper officer to open the road will suffice: *Gloucester v. Canada Atlantic R.W. Co.*, 1 Can. Ry. Cas. 327, 334, but in *St. Liboire v. Grand Trunk R.W. Co.*, 16 L.C.R. 198, 1 L.C.L.J. 54, it was decided that a municipality has no right to open a new road across a track already constructed. Where a road is shown on a registered plan before the construction of the railway, but was not adopted by the city and was never opened or used it is not a highway within the meaning of the Act and the city cannot compel the railway to allow a crossing: *Toronto v. Grand Trunk R.W. Co.*, 2 O.W.R. 3, reversed 4 O.W.R. 491. It is to be observed that as a general rule lands cannot be expropriated which have been already obtained for a public purpose and impressed with a trust in favour of the public: *Re Bronson and Ottawa*, 1 O.R. 415, and while express statutory power is given by section 137, *ante*, to one railway company to enter on lands of another for the purpose of crossing it, no such power is conferred upon a municipality except inferentially by section 186, *infra*, and so apparently it could not apart from the provisions of that section compel a railway company to allow a new street across its tracks. There are, of course, provisions in the municipal acts authorizing municipalities to take lands compulsorily for highways, but an attempt to expropriate lands of a Dominion railway company under the powers conferred by provincial statutes would but for section 186, *infra*, probably be illegal under such cases as *Notre Dame v. Canadian Pacific R.W. Co.*, (1899) A.C. 367; and *Mad-den v. Nelson, etc., R.W. Co.*, 5 B.C.R. 541, (1899) A.C. 626. By

the previous Railway Act, 51 Viet., cap. 29, sec. 11(*g*), the Railway Committee was given power to make orders providing for a highway crossing lands owned by a railway company, but this provision does not appear in the present Act, sec. 23, *supra*.

Use of Streets. Where a company is authorized to lay rails upon a highway it may in the absence of express provision to the contrary, lay its rails closer to one side than the other though such action may be to the greater prejudice of the owners of property on one side of the street: *Attorney-General v. Montreal, etc., R.W. Co.*, 1 L.N. 580. In *Montreal v. Montreal, etc., R.W. Co.*, (1903) A.C. 482, where a company was bound to remove snow from its tracks on the streets, but nothing was said about depositing it on the rest of the street, it was held that the company had the right to do so; but where a company sweeping the snow from its tracks was required by statute to carry it away from the rest of the street, it was compelled to indemnify the city against damages caused by its remaining on the rest of the road: *Toronto v. Toronto R.W. Co.*, 24 S.C.R. 589; *Mitchell v. Hamilton*, 2 O.L.R. 58. In *Hollinger v. Canadian Pacific R.W. Co.*, 21 O.R. 705, 20 A.R. 244, Sir George Burton, at pp. 254, *et seq.*, questions the right of railways to occupy any part of the highway with tracks for their sidings; but this view has not been adopted in other cases in which, if that had been the law, the liability of the company would have been clear, such as *Hurdman v. Canada Atlantic R.W. Co.*, 29 S.C.R. 632, and *Lake Eric, etc., R.W. Co. v. Barclay*, 30 S.C.R. 360, Sir George Burton's remarks were based upon the wording of R.S.C., cap. 109, secs. 12 (2) and 25 (7), which was the Railway Act then under discussion, but it is to be noted that under the interpretation clauses of the present Act the term "the railway" used in this section includes "sidings" and is in every way much wider than the definition of the same words under R.S.C., cap. 109, sec. 4(*f*). Any difficulty which might have existed at the time of Sir George Burton's remarks would therefore disappear under the terms of the present Act. For a further discussion of this subject see an article in 21 Can. Law Times at pp. 477, *et seq.*

Where a railway is authorized by law to run its cars upon the streets it has not such an exclusive right over that part of the highway occupied by its tracks as to require others lawfully using the streets to keep out of the way of its cars at all hazards and persons necessarily or properly upon or crossing the tracks

are entitled to assume that cars will be driven prudently and moderately and not at such an excessive rate of speed as will render the occurrence of an accident probable: *Ewing v. Toronto R.W. Co.*, 24 O.R. 694; *Gosnell v. Toronto R.W. Co.*, 21 A.R. 553, 24 S.C.R. 582; see also *Rattee v. Norwich, etc., Co.*, 18 T.L.R. 562; but a company lawfully authorized to lay and use tracks upon a street has by law a superior right of use and will be entitled to damages from any one who unlawfully obstructs them in such use; as where defendants were moving a house along a street and blocked plaintiff's line thereby causing injury: *Toronto, etc., R.W. Co. v. Dollery*, 12 A.R. 679.

2. No obstruction of such highway with the works shall be made without turning the highway so as to leave an open and good passage for carriages, and, on completion of the works, restoring the highway to a good condition, as nearly as possible, as it was originally.

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Restora-
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Compare 8 Vict., cap. 20, secs. 53 and 54 (Imp.).

Substituted Road. This, like other statutory duties, may be enforced by mandamus; or where the action is taken on behalf of the public, by indictment: *Reg. v. Birmingham, etc., R.W. Co.*, 3 Q.B. 223; *Reg. v. North of England R.W. Co.*, 9 Q.B. 315; and it is no answer to a mandamus to plead that an order to substitute another road the company will have to obtain additional lands. This was laid down in England even though the company's statutory right to take lands had expired: *Reg. v. Birmingham, etc., R.W. Co.*, 2 Q.B. 47; but if a company has permanently leased its line to another railway, no mandamus will be granted: *Re Bristol, etc., R.W. Co.*, 3 Q.B.D. 10. Under the corresponding English section it has been held that it applies equally to a temporary as to a permanent obstruction: *Attorney-General v. Barry Docks Co.*, 35 Ch. D. 573, and see *Tanner v. South Wales R.W. Co.*, 5 E. & B. 618; but a special act conferring similar powers may, of course, be so worded that a company is not bound to substitute a new road for one with which it has interfered: *Tanner v. South Wales R.W. Co.*, 5 E. & B. 618. Generally, however, a company is not relieved from making a substituted road even though there may be an existing road as convenient as any such substituted road may be: *Attorney-General v. Great Northern R.W. Co.*, 4 DeG. & S. 75. Where the effect of a company's works

is to cut off all access to a road from adjoining property an equally convenient means of access in the nature of a substituted road must be furnished: *Hay v. Glasgow, etc., R.W. Co.*, 1 Ct. of Sess. Cases, 4th Ser. 1191. In Scotland it has been held that a company is not bound to repair such substituted road though it may have to repair any bridges on it that it may have built: *Perth v. Kinnould*, 10 Ct. of Sess (3rd Series) 874, but in Ontario where a stream had been diverted and a new bridge built by the railway which was not upon the railway line, it was held that there was no duty on the part of the company to repair the bridge: *Peterboro v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 494, 497. In England where a highway has been closed and a new one substituted the portion of the old highway so closed becomes extinguished as a highway: *Melksham, etc., Council v. Gay*, 18 Times L.R. 358; following *Salisbury v. Great Northern R.W. Co.*, 5 C.B.N.S. 174.

Temporary Obstruction. Where work is necessarily being done upon a street which causes an obstruction, a person who is injured because of its want of repair cannot recover where the work is being done in the usual way and without undue delay; particularly if there is to the knowledge of the person injured a safe way close at hand: *Keachie v. Toronto*, 22 A.R. 371, the general rule being that where harm results to anyone through the performance of what is authorized by law it is *damnum absque injuriâ* where ordinary skill and care are shown in the performance of the work: *Atkin v. Hamilton*, 24 A.R. 389, at p. 390, reversing 28 O.R. 229; and this case decides that even if during operations there is no safer road provided, that is not of itself evidence of want of care and skill.

Restoring Road. Under the original Railway Act, 14 & 15 Viet., cap. 51, sec. 12, it was thought by the court though not then decided, that it was quite proper for a railway company to permanently divert a highway and that it was not bound when its railway had been completed to replace the old highway: *Fredricksburg v. Grand Trunk R.W. Co.*, 5 Gr. 555; but where in the course of construction a ditch was left alongside a highway to take off water, it was held that being a source of danger the company was bound to cover it so as to restore the highway as nearly as possible to its former state of safety, and not having done so it was liable to a person who had been injured: *Fairbanks v. Great Western R.W. Co.*, 35 U.C.R. 523. Where a city was

empowered to authorize certain railway works upon highways which it did, but it was found that in course of executing them a pool of stagnant water would necessarily be created, it was held to be no ground for compelling the company to desist or else fill in the space occupied by the water: *Kingston v. Grand Trunk R.W. Co.*, 8 Gr. 535.

3. Nothing in this section shall deprive any such company of Rights conferred upon it by any Special Act of the Parliament ^{saved.} of Canada, or amendment thereof, passed prior to the present session of Parliament.

4. Every company which violates the provisions of this section shall incur a penalty of not less than forty dollars for each such violation. 51 V., c. 29, s. 183, Am. ^{Penalty.}

185. Whenever the railway crosses any highway at rail level, whether the level of the highway remains undisturbed or is raised or lowered to conform to the grade of the railway, the top of the rail may, when the works are completed, rise above or sink below the level of the highway to the extent of one inch without being deemed an obstruction, unless otherwise directed by the Board. ^{Variation of inch between rail and levels of highway permitted.}
51 V., c. 29, s. 184, Am.

The corresponding section in the previous Act was prohibitive in form requiring that the rail should not be more than one inch above or below the roadway. In its present form it merely provides that if not more than one inch above or below the road it shall not be deemed to be an obstruction. The inference, of course, is that if more than one inch above or below, an obstruction is created, but that is not so stated and it would probably be a question of fact in each case in which the limit of one inch was exceeded. As many ruts in the ordinary country road are more than one inch deep it is quite conceivable that a rail might be more than that below the level without furnishing evidence that it created such an obstruction as to amount to a nuisance upon the highway. Even under the former section it was decided that where an accident occurred at a crossing through a horse running away whereby the wagon was broken the mere fact that the rails protruded more than one inch did not furnish a cause of action

unless in the opinion of the jury that had been the cause of the accident: *Thompson v. Great Western R.W. Co.*, 24 U.C.C.P. 429.

Altering the Level of a Street. Under a power to run along a highway a railway would have no right to alter the level of it: *Wood v. Carleton Branch R.W. Co.*, 14 N.B.R. 244.

Plan of crossing of highway to be submitted.

Powers of Board in such case.

186. Upon any application for leave to construct the railway upon, along, or across an existing highway, or to construct a highway across an existing railway, the applicant shall submit a plan and profile of such crossing, showing the portion of railway or highway affected, to the Board. The Board may by order grant such application upon such terms and conditions as to protection, safety and convenience of the public, as it may deem expedient, or may order that the highway be carried over or under the railway, or be temporarily or permanently diverted, and that such works be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction arising or likely to arise therefrom.

This section has been taken from sections 187 and 188 of the former Act, but they have been very considerably altered.

Railway Passing Over Highway. By section 187 of the Act of 1888, the Railway Committee had express power to deal with railways already constructed over highways so that alterations therein might be ordered, although the road had been constructed prior to the passing of the Act. This is not included in the present section, but is now to be found in 187, *infra*. In *Grand Trunk R.W. Co. v. Toronto*, 1 Can. Ry. Cas. 82, it is held by Meredith, J., that by virtue of its powers over Federal Railways, the Dominion Government might pass such legislation as this and to that extent interfere with the condition of highways which are usually subject to Provincial control, but that though they might delegate to the former Railway Committee as they had done, power to alter the condition of the highway, such power must be exercised by the Committee strictly in accordance with the provisions of the Act, and no power to order a temporary footway having been conferred, such an order was invalid. It is to be observed that there is power under both the old and new

Acts to order a temporary or permanent diversion of the *highway*, but this apparently does not include the making of a temporary *footway*. Even where the Railway Committee had approved of plans for passing over a highway, this does not empower a railway company to enter on or injuriously affect the lands of private parties affected by the works until the usual notices of expropriation had been given and proper compensation had been made: *Parkdale v. West*, 12 A.C. 602, and the existence of a municipal by-law approving of the work, did not dispense with the prior performance of these statutory conditions: *Hendrie v. Toronto, etc., R.W. Co.*, 26 O.R. 667, 27 O.R. 46. Apparently under the present enactment, these cases still apply. In the case of *West v. Parkdale*, 12 S.C.R. 250, the Supreme Court discussed the question whether the railway companies could delegate to a municipality, the power conferred upon the former to expropriate lands necessary for the alteration of a highway, but held upon the facts, that in this case the former was not acting as agent of the railways. This point, however, was not touched upon by the Privy Council in its judgment.

Construction of Highways Across Railways. As pointed out in the notes to section 184 (1) the provision formerly conferring power upon the railway committee to authorize the construction of a highway over a railway does not now exist except for the somewhat incidental provision contained in the present section. By inference, at least, such a power is, however, conferred by section 186 which contemplates the construction of highways across, under, or over railways with the leave of the Board. In *Grand Trunk R.W. Co. v. Toronto*, 1 Can. Ry. Cas. 82, Meredith, J., decided that though the provincial legislature could alone confer power upon a municipality to acquire land for making a street, such legislation was, in cases where it desired to cross land occupied by the tracks of a Dominion railway subject to the supervision of the Federal Parliament and in *St. Liboine v. Grand Trunk R.W. Co.*, 16 L.C.R. 198, 1 L.C.L.J. 54, it was decided that apart from the provisions of any federal enactment, a municipality had no power to decide how a new highway should cross a Dominion railway. Where, however, a railway passes over an unopened road allowance, the municipality may direct that it be opened and may compel the railway company to take down its fences which lie across the road: *Gloucester v. Canada Atlantic R.W. Co.*, 1 Can. Ry. Cas. 327, 334.

Temporarily or Permanently Diverted. See notes to sub-section 184, sub-section 2, *ante*.

Safeguards at Crossings. Under section 187 of the Act of 1888, the Railway Committee might direct a railway "to protect such street or highway by a watchman or by a watchman and gates or other protection, or to carry such a street or highway either over or under the said railway by means of a bridge or arch instead of crossing the same at rail level, or to divert such street or highway either temporarily or permanently or to execute such other works and take such other measures as under the circumstances of the case appear to the Railway Committee best adapted for removing or diminishing the danger, etc." The present section does not specify any particular means by which highways are to be protected as in the earlier Act, but leaves all to the judgment of the Board, though it may be doubted whether the wording of the new section can be said to carry the jurisdiction further than the general terms of the old Act. The methods of "removing or diminishing a danger or obstruction" must, of course, be usually those enumerated in the earlier statute, namely a watchman or gates or bridge or subway. The cases affecting bridges and subways will be found noted under sections 188 and 189, *infra*.

Watchman and Gates. In England under 8 Vict., cap. 20, sec. 47, the railway company is compelled to maintain gates and watchmen at every crossing and it has been held that whether the gates are open or closed the company must see that the line is reasonably safe: *Lunt v. London, etc., R.W. Co.*, L.R. 1 Q.B. 277; *North Eastern R.W. Co. v. Wanless*, L.R. 7 H.L. 12; *Charman v. South Eastern R.W. Co.*, 21 Q.B.D. 524. Some discussion has taken place as to whether a person who finds a gate closed and seeing no one in attendance is entitled to open it himself and it was held by a majority of the court in *Wyatt v. Great Western R.W. Co.*, 6 B. & S. 709, that if a person thus opens a gate and is injured by a train, he cannot recover, but in *Reg. v. Strange*, 16 Cox C.C. 562, it was thought that if this case came before a higher court it might be overruled. If gates are placed at a crossing whether under an order or voluntarily by the company, it is the latter's duty to see that they are maintained in a proper state of repair, and, if, for instance, they are frozen and do not work whereby an accident happens, the company will be liable: *Fleming v. Canadian Pacific R.W. Co.*, 31 N.B.R. 318, 22 S.C.R. 33,

and it is the duty of a watchman placed at a crossing to take every precaution in his power to warn the public: *Smith v. South Eastern R.W. Co.* (1896), 1 Q.B. 178. Where a watchman placed by a company at gates maintained by order of the railway company, threw a cinder at a boy who was leaning on the gates preventing him from raising them and the boy's eye was injured, it was held by Anglin, J., in charging a jury that the company might be responsible as for an act done in the course of his employment: *Hammond v. Grand Trunk R.W. Co.*, 4 O.W.R. 530, and a verdict against the latter in favour of the boy and his mother was returned and upheld by a Divisional Court.

Common Law—Duty to Protect Level Crossings. Under the provisions of section 191, *infra*, signboards must be placed at level crossings and by section 224, a train approaching a level crossing must sound a whistle at least 80 rods before reaching the crossing, and then the bell must be rung continuously until the engine has crossed the highway, and a penalty is provided for failure to comply with these provisions. There has been some doubt whether the provisions contained in these sections are, in the absence of any order of the Railway Committee or Railway Commission, the complete measure of the company's duty in approaching a highway, and in England it has been laid down in *Stubbley v. London, etc., R.W. Co.*, L.R. 1 Ex. 13, that a railway is not required to do more than is prescribed by the statute and it is not open for a jury to find that owing to the particular nature of the crossing, additional measures should be taken to warn the public. This decision was quoted with approval by Mr. Justice Patterson in *Canadian Pacific R.W. Co. v. Fleming*, 22 S.C.R. 44, but his is a dissenting judgment and so far as the case is applicable upon this point, the decision of the majority was to the effect that it is open to a jury to find that other measures should be taken to protect a more than ordinarily dangerous level crossing, besides those prescribed by the statute. The effect of the *Stubbley Case* might perhaps also be weakened by *Smith v. South Eastern R.W. Co.* (1896), 1 Q.B. 178. In Canada it was said in *Lett v. St. Lawrence, etc., R.W. Co.*, 1 O.R. 545, that where the scene of the accident was an unusually dangerous crossing and there was in the opinion of the jury a failure not only to give the statutory signals, but also to provide a man on the rear end of a car which was moving reversely, this might be sufficient ground for an action. The case was also reported in

11 A.R. 1, and 11 S.C.R. 422, but the judgments in the higher courts were directed to the question of damages only. The principle of the case was, however, relied on in *Henderson v. Canada Atlantic R.W. Co.*, 25 A.R. 437, and 29 S.C.R. 632, and Sir Henry Strong at page 636 of the latter report says: "Further I think it right to say that in all this evidence (that the bell did not ring, that the speed was over six miles an hour, and that a flagman who was stationed there, did not give warning) we should be justified in holding that there was common law negligence as in the case of *St. Lawrence & Ottawa R.W. Co. v. Lett.*" In *Lake Erie, etc., R.W. Co. v. Barclay*, 30 S.C.R. 360, it was laid down that where shunting was being done in a town, and the jury found that the railway company was guilty of negligence in that a man should be stationed on a highway to warn the public of the operations then going on, a verdict for the plaintiff was upheld, and a similar rule has been adopted in the United States: *Pennsylvania R.W. Co. v. Miller*, 99 Federal Reporter 529. In *Girouard v. Canadian Pacific R.W. Co.*, 1 Can. Ry. Cas. 343, Curran, J., in Quebec, decided that where the railway traffic at a highway crossing was very great and there was no gate, guardian, lamp or other protection for the public, although the company had been notified of the dangerous condition of the crossing, it was responsible for the death of the plaintiff's son which occurred without any fault on the latter's part. Also in *Moyer v. Grand Trunk R.W. Co.*, 2 Can. Ry. Cas., page 1, it was laid down by the Court of Appeal for Ontario, that special circumstances may call for other provisions in addition to those prescribed by statute as to ringing the bell or blowing the whistle as a warning, and what those additional precautions should be is in each case a question for the jury, and the *Barclay Case* in the Supreme Court was followed. The subject is also dealt with in *Tanguay v. Grand Trunk R.W. Co.*, 3 Can. Ry. Cas. 13, but the decision turned on other points. Finally in *McKay v. Grand Trunk R.W. Co.*, 3 Can. Ry. Cas. 42, the Court of Appeal refused to set aside a judgment entered on findings of a jury that the injury complained of was caused by the excessive speed of the train, coupled with the absence of proper protection at the crossing and that it was under the circumstances the duty of the company to provide a flagman or gates, although there was no order of the Railway Committee requiring that this should be done. This judgment was reversed by the Supreme Court in *Grand Trunk R.W. Co. v.*

McKay, 3 Can. Ry. Cas. 52, and it was stated by Mr. Justice Davies, who delivered the judgment of the court, that by the Railway Act, Parliament had vested in the Railway Committee of the Privy Council (now the Board of Railway Commissioners) the exclusive power and duty of determining the character and extent of the protection which should be given to the public at places where the railway track crosses a highway at rail level, and that these powers are not subject to review either as to their adequacy or otherwise by a jury, nor is any failure to invoke the exercise of the powers of the Railway Committee sufficient to take the matter away from that jurisdiction and vest it in a jury. The case of *Lake Erie v. Barclay*, 30 S.C.R. 360, was distinguished and it appears from his judgment that unless the Board of Railway Commissioners have prescribed additional precautions at railway crossings, it is not open for a jury to find that a railway company is guilty of negligence because it failed to take some additional precaution, which neither the statute nor the Board of Railway Commissioners has required.

Cost of Making and Maintaining Protection. In *Canadian Pacific R.W. Co. v. County and Township of York*, 1 Can. Ry. Cas. 36 and 47, the question arose whether the Railway Committee of the Privy Council could compel municipalities to pay a proportion of the cost of maintenance of a watchman and gates which had been ordered at a highway, and the constitutionality of the section which then gave such a power to the Railway Committee was attacked. It was held by a divided court that this legislation was within the power of the Dominion Parliament, and that it could order any municipality who were "persons interested" within the meaning of the statute to pay a proportion of the costs, but their powers were limited to making only those municipalities or persons pay who could be said to be interested within the meaning of that section, and that as the county of York had no longer any interest in that portion of the highway crossed by the railway, an order directing it to pay a portion of the costs was invalid. Two of the learned judges also held that under the statute the powers of the Railway Committee were limited to persons or municipalities invoking the exercise of its jurisdiction and that those who did not attorn to it by applying to the Railway Committee could not be bound by their order, but this cannot be taken to be the judgment of the court, or the full effect of the decision in question.

As to
land re-
quired.

2. When the application is for the construction of the railway upon, along or across an existing highway, all the provisions of law at such time applicable to the taking of land by the company, to its valuation and sale and conveyance to the company, and to the compensation therefor, shall apply to the land, exclusive of the highway crossing, required for the proper carrying out of any order made by the Board.

Right to Take Highway. It will be seen that under section 184, *ante*, a company may under certain conditions run its railway "upon, along or across a highway," but nothing is there said about a company actually taking and closing a part of the highway for the purpose of its undertaking. By section 118(c) it may take the "lands" of any "person" for the construction of its railway and by section 118 (k) it may construct its lines "upon, across, under or over any . . . highway which it intersects or touches." Lands by section 2(m) "means the lands, the acquiring, taking or using of which is incident to the exercise of the powers given by this or the Special Act and includes real property, messuages, lands, tenements, and hereditaments of any tenure." It remains in doubt, therefore, whether a company can actually expropriate and close up a part of the street or highway necessary for its undertaking. In view, however, of the special provisions applicable to the user of highways and the limited nature of the interest in them which is specifically conferred by the Act, it may perhaps be said that a railway can acquire no more than an easement in highways and may not expropriate the fee in them. In the case of many of our Canadian roads the fee is vested in the Crown though the possession is in the municipality (see, for instance, 2 Edw. VII., cap. 19, secs. 598 and 601) and the interest of the Crown cannot be expropriated without its consent, secs. 134 to 136, and the Crown in such a case would be represented by the Provinces: *Re Trent Valley Canal*, 11 O.R. 687. In such a case, therefore, it would appear that there can be no expropriation of the fee without the consent of the proper Provincial authorities. In practice where a street or highway is to be closed any difficulty is overcome by entering into an agreement with the municipality whereby the road is closed under the latter's statutory powers in that behalf and then conveyed to the railway company.

Compensation for Occupying Streets. The right of the Crown and the municipalities to compensation has been dealt with under section 184, *ante*. The right of an individual to compensation generally arises where by the closing, diverting, or altering of a highway his access to it has been cut off or diminished. If his rights in this regard have been permanently affected so that he is injured in a manner different from that in which the general public as users of the highway are affected, he may recover for such loss or interference with his access: *West v. Parkdale*, 7 O.R. 270, 8 O.R. 59, 12 A.R. 393, 12 S.C.R. 250; *Parkdale v. West*, 12 A.C. 602, and if the company does not proceed regularly in thus making use of the highway, he may recover damages at law: *West v. Parkdale*, *supra*; *Sibbald v. Grand Trunk R.W. Co.*, 19 O.R. 164, 18 A.R. 184, 20 S.C.R. 259; but if he has sustained no damages other than that suffered by the general public he cannot under these cases recover damage at law, and if the Company has proceeded regularly, he must if his right of access has been cut off or diminished, proceed under this and the other expropriation clauses of the statute: *Casgrain v. Atlantic, etc., R.W. Co.*, (1895) A.C. 282. If a person has been injuriously affected by a cutting in a street in a special manner, he may proceed against the company, but not against assignees who may have secured its rights and franchises: *Hamilton v. Covert*, 16 U.C.C.P. 205. A person who by the construction of a railway upon a road has lost the means of egress from his dwelling may recover for his loss: *Brown v. Toronto, etc., R.W. Co.*, 26 U.C.C.P. 206; *Lyon v. Fishmongers Co.*, 1 A.C. 662; and this right exists where means of access or egress have been impeded or additional fences or earthworks become necessary for preserving the land or properly enclosing it: *Reg. v. St. Lukes*, L.R. 7 Q.B. 148; *Moore v. Great Southern, etc., R.W. Co.*, 10 Ir. C.L. 46; *Caledonian R.W. Co. v. Walker's Trustees*, 7 A.C. 259, and if a road is narrowed whereby the value of property is depreciated a right to compensation arises: *Beckett v. Midland R.W. Co.*, L.R. 3 C.P. 82; *Metropolitan Board of Works v. McCarthy*, L.R. 7 H.L. 243; but if the injury is not to the property as such, but merely to the property as used for a particular purpose such as special kind of business carried on upon the premises, no right of action will accrue: *Rex v. London Dock Co.*, 5 A. & E. 163; *Rickett v. Metropolitan R.W. Co.*, L.R. 2 H.L. 185, and the temporary obstruction of a highway for the purpose of a public work

does not entitle the owner of land adjoining the highway to compensation: *Herring v. Metropolitan Board of Works*, 34 L.J.M.C. 224; and the mere fact that a person is more injured from the proximity of his land to a level crossing than others further away gives no right to compensation: *Caledonian R.W. Co. v. Ogilvy*, 2 Macq. (H.L.) 339; *Wood v. Stourbridge R.W. Co.*, 16 C.B.N.S. 222; and inconvenience and loss to owners adjoining a highway on which a railway is laid caused by vibration, smoke or noise, does not entitle the owners to damages: *Powell v. Toronto, etc., R.W. Co.*, 25 A.R. 209; *Re Medler and Toronto*, 4 Can. Ry. Cas. 13, but in this particular case of *James v. Atlantic, etc., R.W. Co.*, Q.R. 12 K.B. 392, it was held that the owner of a bridge might recover for damages arising from a railway company crossing a public road leading to his bridge in such a way as to interfere with the means of access to the latter. It should be noted that Hall and Bossé, J.J., dissented from the judgment of the majority in this case.

Supervi-
sion of
work.

3. The Board may give directions respecting supervision in the construction of any such work.

This section is new. As pointed out in the notes to section 184, sub-section 1, *ante*, under the heading "supervision," the approval of a municipal officer under whose direction work is to be done does not release the company from liability to conform to statutory requirements. The same rule would probably apply to any supervision under this section though there are as yet no decided cases upon it.

Details
to be
approved
by
Board.

4. When the Board orders that the highway be carried over or under the railway, or any works to be executed, the Board may direct that the detailed plans, profiles, drawings and specifications of all necessary structures, shall, before construction, be submitted to and approved by the Board. The Board may make regulations respecting the plans, profiles, drawings and specifications required to be submitted under this section. 51 V., c. 29, ss. 187, 188, Am.

The following rules issued by the Board of Railway Commissioners in October, 1904, may be useful in this connection:—

Highway Crossings. Sections 184 to 191.

Send to the Secretary of the Board with an application three sets of plans and profiles of the crossings.

Scale—plan—100 feet to inch.

Profile 100 feet to inch horizontal, 20 feet to inch vertical.

1st set for approval by and filing with the Board.

2nd and 3rd sets to be furnished to the respective parties concerned with a certified copy of the order approving the same.

The plan and profile should show at least half a mile of the railway and 200 feet of the highway on each side of the crossing.

The applicant must give ten days' notice of application to the opposite party and with such notice shall serve a copy of the plan and profile and of the application.

187. Where the railway is already constructed upon, along or across any highway, the Board may order the company within a specified time to submit to the Board a plan and profile of such portion of the railway, and may, upon such submission, make any order in respect thereto as in the previous section provided. ^{As to existing crossings.}

This section is new in form. Under the previous Act, sections 187 and 188, though the Railway Committee might order additional measures of safety, there was no express provision enabling it to scrutinize the character of a crossing with a view to compelling the railway company to change the grade or approaches to it or to change the direction of the railway line where it crosses a highway. There was, however, a general power under section 187 of the former Act to compel a company to execute such other works and take such other measures as would be best adapted for removing or diminishing the danger, so that though the wording has been changed, it is doubtful whether any additional powers could be or have been conferred by this section. By making it refer specifically to existing crossings it may be, however, that no railway can now plead that the general Railway Act does not apply to railways constructed under earlier and Special Acts of Parliament.

Height of
bridge,
etc.

188. The highway at any overhead railway crossing shall not at any time be narrowed by means of any abutment or structure to an extent less than twenty feet, nor shall the clear headway from the surface of the highway to the centre of any overhead structure constructed after the passing of this Act be less than fourteen feet, unless otherwise directed or permitted by the Board. 51 V., c. 29, s. 185, Am.

This section differs considerably from the former section 185, which provided that the inclination of the highway approaching the bridge should not be greater than one foot in twenty. This is now covered by section 190, *infra*. In the old section nothing was said about the width of a highway where it passes under a railway, but that is now provided for by this section.

Headway. A clear headway of fourteen feet is now required where only twelve feet was formerly required. The corresponding English provisions are to be found in 8 Viet., cap. 20, sec. 49, 50 and 51, but they deal with the subject much more in detail than is done in the Canadian Act. Under the English Act it has been held that these sections do not remove restrictions imposed upon the company by any special legislation affecting it: *Attorney-General v. Tewkesbury, etc.*, R.W. Co., 1 D. J. & S. 423; nor do they relieve it from any binding agreement for a greater breadth which the company may have made with a land owner: *Clark v. Manchester, etc.*, R.W. Co., 1 J. & H. 631. Where a company has been authorized to carry a highway under its tracks by means of a subway it must leave the full headway called for by the statute and yet avoid lowering the road so much that it will render it liable to floods: *Attorney-General v. Furness R.W. Co.*, 47 L.J. Ch. 776. Where a company's Special Act required it to cross a canal by means of a bridge having a clear headway of eight feet over the towing path, it was held that where the bridge gradually subsided so that there was only a headway of two feet over the canal, it was the duty of the railway to raise the bridge to leave the eight feet headway called for by statute, even though no such duty was expressly prescribed by the Act: *Glamorganshire Canal Co. v. Rhymney R.W. Co.*, 19 T.L.R. 240; but where a bridge has been constructed with a sufficient headway over a highway, but owing to changes made by the municipality having control of the highway the headway

has been lessened, the railway company is not liable for the consequent damages, but only the municipality: *Carson v. Weston*, 1 Can. Ry. Cas. 487, citing *Gray v. Danbury*, 54 Conn. 574; and where a railway lowers a road to enable it to pass under the track, the company is not bound to keep the slope of the highway in repair: *Waterford, etc., R.W. Co. v. Kearney*, 12 Ir. C.L. 224; *Fosberry v. Waterford, etc., R.W. Co.*, 13 Ir. C.L. 494; *London, etc., R.W. Co. v. Skerton*, 5 B. & S. 559.

Width of Roadway. The present provision requires that the road under a railway bridge shall not be less than twenty feet without the permission of the Board. As under section 186, sub-section 4, the details of any alteration of a highway must be approved by the Board it would seem to be a matter for that body to determine, how wide the passage way should be. Under section 189, it is provided that any structure by which a highway is carried over or under a railway, shall be at all times so maintained as to afford safe and adequate facilities for traffic. It would appear from this that a company could be compelled with the growth of the traffic through a subway to widen it where such a course becomes necessary. The subject of width of approaches will be dealt with under section 189, *infra*. See also notes to sections 190, 202 and 203, *infra*.

For a discussion of the steps which it is necessary to take in order to construct a subway see *West v. Parkdale*, 7 O.R. 270, 8 O.R. 59, 12 A.R. 393, 12 S.C.R. 205; and *Parkdale v. West*, 12 A.C. 602.

189. Every structure, by which any highway is carried over or under any railway, shall be so constructed, and, at all times, be so maintained, as to afford safe and adequate facilities for all traffic passing over, under or through such structure.

This is new. Compare 8 Vict., cap. 20, sec. 46 (Imp.). By section 119, *ante*, the company must restore a highway which it passes over, under or across as nearly as possible to its former state of usefulness and by section 186 (4) the Board must approve all plans for crossing a highway and this section constitutes a new and wider provision for safeguarding the rights of users of a highway. As mentioned in notes to section 188, *supra*, it may perhaps be so construed in the light of other sections of this statute as to require railway companies to enlarge bridges,

! All structures must be safely constructed and maintained.

subways and their approaches from time to time as the exigencies of an increasing traffic require. Section 187 also gives the Board power to supervise the plans of highway crossings already constructed and so if there is now a right to compel railway companies to enlarge subways or bridges that right is probably vested in the Board.

Repair of Highway Crossings and Bridges. This section provides for the maintenance of the "structure" so as to afford safe facilities for the traffic, from which it may reasonably be inferred that a railway company must maintain any highway crossing or bridge in a proper state of repair and will be liable for any damages that may arise from the want of repair. In England the statute expressly requires a railway company to repair bridges over highways (8 Vict., cap. 20, sec. 46), and where a public road is carried over the tracks by a bridge the company must keep both the bridge and that part of the roadway upon it, including the metalling of the road, in proper repair: *North Staffordshire R.W. Co. v. Dale*, 8 E. & B. 836; *Newcastle v. Dale*, 5 H. & N. 160; *London, etc., R.W. Co. v. Bury*, 14 A.C. 417; but where it closes an old road and substitutes one which does not cross its track, it need not repair a bridge which it erected on such substituted road: *Perth Magistrates v. Kinnoul*, 10 Sc. Sess. Cases (3rd Ser.) 874; and so where it diverts a stream and builds a bridge over the diversion there is no duty on it to maintain such bridge, but such duty is laid solely upon the municipality: *Peterborough v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 494. Where by agreement a railway company acquired land for a new roadway and carried it over its track by means of a bridge built on private lands acquired by the company and thereafter the old roadway fell into disuse it was held that, there being no structural necessity for the new highway and bridge, the English statute did not apply and the company was not bound to maintain or repair it or its approaches: *London, etc., R.W. Co. v. Ogwen*, 80 L.T. 401. It has generally been held in Canada, as in England, that a railway company must under the terms of the statute repair bridges which it has erected and is liable to any person injured by reason of its failure to do so: *Van Allen v. Grand Trunk R.W. Co.*, 29 U.C.R. 436, and in the absence of any statute relieving it from such liability the municipality having charge of the road which is carried over the track by means of a bridge erected by a railway must also repair it: *Mead v. Etobi-*

coke, 18 O.R. 438; *Halifax v. Lordley*, 20 S.C.R. 505, at p. 512; and *Fairbanks v. Yarmouth*, 24 A.R. 273. In Ontario, however, a statute has recently been passed (3 Edw. VII., cap. 19, sec. 611) relieving the municipality from any such liability where there is a duty on the part of a railway or some other person to do so: *Holden v. Yarmouth*, 3 Can. Ry. Cas. 74. Where a duty such as this is imposed the company must keep the bridge in such a state as not to injure anyone using it in a lawful manner: *Lay v. Midland R.W. Co.*, 34 L.T.N.S. 30, and where a child five years old while crossing a bridge placed his back against the hoardings and slid along until he came to ornamental work through which he fell upon the ground beneath and was injured, it was held that there was evidence upon which a jury might find that the bridge was not reasonably safe: *ibid.*; and see *Longmore v. Great Western R.W. Co.*, 19 C.B.N.S. 183; but the mere opinion of a witness that a bridge is not safe is not evidence sufficient for a jury: *Riggs v. Manchester, etc., R.W. Co.*, 12 Jur. N.S. 525; and where a company were repairing a bridge and had barricaded the entrance and put up a "no thoroughfare" notice, the parents of a boy who went upon the bridge while it was light and fell through and was killed, were unable to recover damages: *Farrell v. Grand Trunk R.W. Co.*, 2 Can. Ry. Cas. 249.

190. The inclination of the ascent or descent, as the case may be, of any approach by which any highway is carried over or under any railway, or across it at rail level, shall not be greater than one foot of rise or fall for every twenty feet of the horizontal length of such approach, unless the Board directs otherwise: and a good and sufficient fence shall be made on each side of such approach, and of the structure connected with it,—which fence shall be at least four feet six inches in height from the surface of the approach or structure. 51 V., c. 29, s. 186, Am.

Inclination of highway.
Fencing approaches.

Formerly section 186; compare 8 Vict., cap. 20, secs. 49 and 50. In England the inclination or slope varies from one foot in sixteen, to one foot in thirty according to the character of the road.

Approaches. This inclination is usually described as the "approach" to a crossing and is so used in the above section. In *Traversy v. Gloucester*, 15 O.R. 214, a case under the Ontario

Municipal Act "approaches" are defined by Armour, C.J., at page 216 as "such artificial structures as may be reasonably necessary and convenient for the purpose of enabling the public to pass from the road to the bridge and from the bridge to the road." This may easily be applied, *mutatis mutandis*, to approaches at level crossings.

Width of Approaches. In *Moggy v. Canadian Pacific R.W. Co.*, 3 Man. L.R. 209, it was said by Taylor, C.J., that there was no law requiring approaches to a bridge or level crossing to be of equal width with the rest of the road, but that they must be wide enough for the ordinary purposes of traffic having regard to the character of the highway and this is apparently the law in the United States: Elliott on Railways, vol. 3, p. 1668; *Re North Manheim*, 36 A. & E. Ry. Cases 194; but where a company does not occupy the total width of the road with the approaches and leaves the rest in a dangerous condition it will be liable for any resultant damages: *Fairbanks v. Great Western R.W. Co.*, 35 U.C.R. 523, and, of course, if it neglects to fence any such approach as required by this section it will also be liable: *Holden v. Yarmouth*, 3 Can. Ry. Cas. 74, and before the amendment to the Ontario Municipal Act already referred to, the municipality having charge of the roadway would be liable as well: *Toms v. Whitby*, 35 U.C.R. 195, 37 U.C.R. 100.

Repairing Approaches. Under the English Act, 8 Viet., cap. 20, sec. 46, a railway company is expressly required to repair the approach to a bridge: *North Staffordshire R.W. Co. v. Dale*, 8 Ex. D. 836; *Great Western R.W. Co. v. Hackney*, 8 A.C. at pp. 699 and 700, and an intimation was given that the same rule applied in Ontario, though there was no express provision in the Act: *Mead v. Etobicoke*, 18 O.R. 438; *Fairbanks v. Yarmouth*, 24 A.R. 273, but these cases turned upon other points and cannot be treated as express authority for this proposition. In the case of approaches to a level crossing, it was held in Manitoba according to the head note in *Moggy v. Canadian Pacific R.W.*, *supra*, that a railway must repair the approaches to a level crossing, though the facts showed rather a failure to properly construct the crossing itself than a failure to subsequently repair its approaches. Taylor, C.J., there cited the case of the *People v. New York, etc., R.W. Co.*, 74 N.Y. 302, in support of the broad proposition hardly necessary for the decision of the case before him that a railway must keep the ap-

proaches to a level crossing in a proper state of repair. All the cases show, however, that such a duty to repair must be found in the wording of the statute or be a fair inference from its terms, and in *West Lancashire v. Lancashire, etc., R.W. Co.* (1903), 2 K.B. 394, the defendants were released from any liability to repair the approaches to a level crossing where no statutory duty to do so was laid upon them. By section 189, *ante*, there is manifestly a duty to maintain the "structure" by which a highway is carried over or under a railway, and it will be seen that in the latter part of section 190 a fence must be made on each side of the *approach* and the *structure* connected with it, thus differentiating between the "structure" and its approach. If such distinction can properly be found in these sections it may be that a railway company is not now bound to repair the approaches to a highway, but that such duty falls solely on the municipality. In *Palmer v. Michigan Central R.W. Co.*, 3 Can. Ry. Cas. 194, Boyd, C., in speaking of approaches to a farm crossing, says: "While the presumption would be in the case of a public way that the approach is part of the bridge and to be kept in repair by the railway company that does not appear to obtain in the case of a private crossing such as this." It should be noted, of course, that this case was decided upon the terms of the Act of 1888. Some assistance may be found towards interpreting the word "structure" from the cases of *Adamson v. Rogers*, 26 S.C.R. 159, at page 174; *Coole v. Lovegrove* (1893), 2 Q.B. 44; *Venner v. McDonell* (1897), 1 Q.B. 421; *Elliott v. London County Council* (1899), 2 Q.B. 277; *London County Council v. Humphreys* (1894), 2 Q.B. 755; and *London County Council v. Pearce* (1892), 2 Q.B. 109.

191. Signboards at every highway crossed at rail level by any railway, shall be erected and maintained at each crossing, and shall have the words "railway crossing" painted on each side of the sign board, in letters at least six inches in length, and in the Province of Quebec, such words shall be in both the English and the French languages; and every company which neglects to comply with the requirements of this section shall incur a penalty not exceeding forty dollars. 51 V., c. 29, s. 190, Am.

Sign-boards at level crossings. Penalty.

Formerly section 190. This is one of the precautions prescribed by statute which must, of course, be observed.

In *Soule v. Grand Trunk R.W. Co.*, 21 U.C.C.P. 308, the defendants were sued by a person whose horse ran into a signboard erected on the highway. It was held that the defendants would not be liable merely for putting the posts in the highway as the law allows them to do so; provided they place them in a reasonably proper manner with a due regard to all the surrounding circumstances, although the posts might necessarily obstruct the use of that part of the road upon which they are placed, nor would they necessarily be guilty of an indictable nuisance.

Telegraph, Telephone and other Lines and Wires.

Telegraph
and tele-
phone
lines.

192. The company may construct and operate telegraph and telephone lines upon its railway, for the purposes of its undertaking; and for the purpose of operating such lines or exchanging and transmitting messages, may enter into contracts with any companies having telegraph or telephone powers, and may connect its own lines with the lines of, or may lease its own lines to, any such companies.

R.S.C.,
c. 132.

2. The Electric Telegraph Companies Act shall apply to the telegraphic business of the company.

This section in its present form is new. It does not appear to authorize railways to build telegraph or telephone lines for commercial purposes, but only for the purposes of the undertaking, that is for the railway, the wording in this respect being similar to the wording in the first line of section 118, *ante*, so that unless power is given to a railway company by its Special Act to do a commercial business, this section would not presumably enable it to do so, but the section expressly enables it to lease its lines to companies having powers to do a general business.

The Electric Telegraph Companies Act, R.S.C., cap. 132, provides for the construction of the line, that no bridge shall be built by a telegraph company over navigable rivers, that messages shall be transmitted in the order of receipt except certain preferential messages there designated and that in certain events the Government may temporarily take over the line. In the case of

railway telegraph lines, this is also provided for by sections 233 and 234, *infra*. Except in the case of railway companies authorized to do a commercial business, there does not appear to be much to which R.S.C., cap. 132, would frequently apply. In this connection reference should also be made to R.S.C., cap. 134, being "An Act Respecting Secrecy by Officers and Persons Employed on Telegraph Lines" which provides for the punishment of telegraph employees who divulge information except when lawfully authorized or directed to give it. This statute does not provide an absolute privilege for telegrams which must notwithstanding its provisions be produced by the company when it has been duly subpœnaed: *Re Dwight v. Macklem*, 15 O.R. 148; followed *Hannum v. McRae*, 18 P.R. 185, but it is submitted that a telegraph company should not be subpœnaed to produce its copy until the usual methods of securing the copies in the hands of the sender or receiver have been exhausted. In an unreported case in Ontario of *Batten v. Gordon* in 1899, Boyd, C., in Chambers, adjourned a motion to compel a telegraph company to produce telegrams until an effort had been made to obtain copies from the persons who received them, and production having been obtained in this way the matter dropped. Other statutes affecting telegraph companies are R.S.O., cap. 208, sec. 18 (1), requiring street railway companies incorporated under the general Act to maintain guard wires over their trolley wires sufficient to prevent broken telegraph wires coming in contact with them; and the Ontario Act, R.S.O., cap. 192, respecting Provincial telegraph companies which is similar to R.S.C., cap. 132.

Lease of Right to Operate. In *Canadian Pacific R.W. Co. v. Western, etc., Co.*, 17 S.C.R. 151, at p. 158, it was said that a railway company "had as incident to and necessary for the safe operation of the road, the right and power to erect a telegraph line and had the exclusive right to do so along their line of railway and having themselves such exclusive right, I can see no reason why they cannot confer such exclusive right and the other privileges mentioned in the contract whereby they were enabled to secure ample telegraphic services for the operation of the road instead of erecting and equipping a line of telegraph for themselves." It was further held that a railway company which had made such a contract had power to bind by it any railway to which the railway was subsequently assigned: *Great, etc., Co. v. Montreal Telegraph Co.*, 20 S.C.R. 170.

Municipal
telephone
systems,
connec-
tion with.

193. Whenever any municipality, corporation or incorporated company has authority to construct, operate and maintain a telephonic system in any district, and is desirous of obtaining telephonic connection or communication with or within any station or premises of the company, in such district, and cannot agree with the company with respect thereto, such municipality, corporation or incorporated company may apply to the Board for leave therefor, and the Board may order the company to provide for such connection or communication upon such terms as to compensation as the Board deems just and expedient, and may order and direct how, when, where, by whom and upon what terms and conditions such telephonic connection or communication shall be constructed, operated and maintained.

In some instances agreements have been made between railways and certain telephone companies that the latter shall have the exclusive right to instal telephones in the former's stations, and under this agreement competing telephone companies had been refused leave to place their instruments upon railway property. The purpose of this clause, which is new, is to enable all telephone lines to have their instruments in the stations, notwithstanding the refusal of the railway companies, provided they can first obtain the approval of the Board.

In *Port Arthur v. Bell Telephone Co.*, 3 Can. Ry. Cas. 205, two municipalities owning and operating a joint telephone system within their limits applied to the Board of Railway Commissioners, under this section, for an order directing the Canadian Pacific R.W. Co. to allow the installation of telephone instruments in its railway stations and for leave to connect the same with their telephone system.

Prior to the enactment of this section, and in May, 1902, an agreement was made between the Railway Company and the Bell Telephone Co. whereby the latter, for valuable consideration, was granted for a period of ten years the exclusive privilege of placing telephone instruments, apparatus and wires, in the several stations, offices and premises of the railway stations in Canada, where the Telephone Company had established or might, during the continuance of the agreement, establish telephone exchanges. It was held by Hon. A. G. Blair, Chief Com-

missioner, that the agreement was valid and not void or voidable as being in restraint of trade or against public policy, and that an order made under this section should provide for payment of compensation upon just terms for all lawful rights and interests injuriously affected thereby. The Hon. M. E. Bernier, Deputy Commissioner, thought that while the agreement was valid and compensation should therefore be allowed; the question of compensation should be reserved for future consideration and determined after hearing any case that might be presented by the Canadian Pacific R.W. Co., or any other railway company in support of damages, and Dr. Mills, Commissioner, thought that the agreement was in restraint of trade and against public policy, and that compensation should be awarded only for the use of the premises occupied by the applicant's telephones and the expense of operating them.

The operation of the order was stayed to allow argument upon the *quantum* of compensation and judgment upon this point has not been given yet.

194. No lines or wires for telegraphs, telephones, or the conveyance of light, heat, power or electricity, shall be erected, placed or maintained across the railway without leave of the Board. Wires,
etc.,
across
railway.

2. Upon any application for such leave, the applicant shall submit to the Board a plan and profile of the part of the railway proposed to be affected showing the proposed location of such lines and wires and the works contemplated in connection therewith; and the Board may grant such application and may order by whom, how, when, and on what terms and conditions, and under what supervision, such work shall be executed; and upon such order being made such lines and wires may be erected, placed and maintained across the railway subject to and in accordance with such order. Plans to
be sub-
mitted to
Board.

Order by
Board

Under the maxim *cujus est solum ejus est usque ad coelum* no person would have the right to place wires across another's property, unless such right were expressly or impliedly given by statute. The present section enables a company having power

to cross a railway with its wires to do so subject to the supervision of the Board. No provision is made in so many words for paying compensation for the right, but in a proper case, the Board would no doubt make the payment of compensation a "term or condition" upon which alone the right to cross should be granted.

Lines and
wires on
highways.

195. When the company is empowered by the Special Act of the Parliament of Canada to construct, operate and maintain lines of telegraph, telephone, or for the conveyance of light, heat, power or electricity, the company may with the consent of the municipal council or other authority having jurisdiction over any highway, square, or other public place, enter thereon for the purpose of exercising the said powers, and, as often as the company thinks proper, may break up and open any highway, square or other public place, subject, however, to the following provisions:—

Compare 26 & 27 Vict., cap. 112 (Imp.).

Scope of Section.

The "company" referred to in this section if it is to be limited by the interpretation clauses of this Act can by section 2 (c), *ante*, mean only "a railway company" and include only "any person having authority to construct or operate a railway." As limited in this way the above section would only apply to railway companies having authority to do the things mentioned in this section, and if it is to be construed with reference to the preceding clauses, section 192, *ante*, would seem to make this limitation even clearer. This section was taken from 62 & 63 Vict., cap. 37, sec. 1, and began "when any company has power by any Act of Parliament to construct," etc. These words were probably wide enough in themselves to include any company and would not be restricted to the railway companies under 51 Vict., cap. 29, sec. 2(a). The application of the present section to companies other than railways is by no means clear, though from the fact that railways other than electric lines are rarely if ever given power to convey "light, heat, power and electricity," and that there are only a few railways who are authorized to do a commer-

cial telegraph or telephone business, it would appear that it was intended to include companies having those specific objects in view.

Rights on Highways. The present section requires that municipalities shall consent to the breaking up and opening of highways by these companies. Where a telephone company had with the leave of a town placed their poles upon a highway and an electric light company which had also subsequently obtained similar leave proceeded to erect poles and wires in dangerous proximity to those of the telephone company, it was held that the latter having been lawfully in prior possession the light company should be restrained from placing their poles in such a position as would cause danger: *Bell Telephone Co. v. Belleville Electric Light Co.*, 12 O.R. 571; *Jacques Cartier, etc., Co. v. Quebec, etc., Co.*, Q.R. 11 Q.B. 511. But a municipaliay is not authorized in Ontario to grant an exclusive right to use its streets and thereby create a monopoly: *Re Robinson and St. Thomas*, 23 O.R. 489; and the same rule prevails in Manitoba: *Winnipeg, etc., Co. v. Winnipeg, etc., R.W. Co.*, 9 Man. L.R. 219; but a different rule was laid down in Quebec: *Bell v. Westmount*, Q.R. 9 Q.B. 34, though the case turned somewhat upon the terms of the particular contract in question which granted exclusive privileges for ten years. The subject was much discussed in *Ottawa, etc., R.W. Co. v. Hull Electric Co.*, Q.R. 16 S.C. 1, Q.R. 10 Q.B. 34, (1902), A.C. 237, though the decision finally turned on the terms of special legislation validating an exclusive franchise. The fact that a telephone company has planted its poles on a highway with the consent and under the supervision of a municipality does not relieve it from liability if it appears that there has been negligence in placing them which has resulted in injury to the plaintiff: *Bonn v. Bell Telephone Co.*, 30 O.R. 696; *Joyce v. Halifax Street R.W. Co.*, 24 N.S.R. 113; and *Atkinson v. Chatham*, 29 O.R. 518, 26 A.R. 521, reversed 31 S.C.R. 61, where it was finally held that the company was not liable for injuries sustained by a carriage coming in contact with a telephone pole lawfully placed in the highway. Speaking generally, it may be said that a telephone or other company has no right to use the streets without legislative sanction either directly or indirectly through the action of properly authorized municipal bodies: *Regina v. United, etc., Co.*, 31 L.J.M.C. 666, 9 Cox C.C. 172, and the right of the public is to have the whole width of the road preserved free from

obstruction, and it is not confined to that part which is used, or the *via trita*: *Turner v. Ringwood*, L.R. 9 Eq. 418, 422. But the effect of Canadian legislation is to legalize the obstruction created by the poles so far that they cannot be abated or complained of as a public nuisance: *Sherbrooke, etc., Assn. v. Sherbrooke*, Mont. L. R. 6 Q.B. 100; but that still leaves open the question whether the company may not be mulcted in damages for particular injury to a traveller if the obstruction is found to be dangerous: See *People v. Metropolitan, etc., Co.*, 31 Hun. 596; and *Bonn v. Bell Telephone Co.*, 30 O.R. 696. In England where the fee in a street is generally vested in individuals and the possession and control are vested in municipalities or urban authorities only for the purpose of regulating the ordinary user of the highway as such, it has been held that they have no power to prevent the passage of wires overhead which are so high that the ordinary user of the street is not interfered with: *Finchley, etc., Co. v. Finchley* (1902), 1 Ch. 873, reversed (1903), 1 Ch. 337, and compare *Montreal, etc., R.W. Co. v. Ottawa*, 2 O.L.R. 336, 4 O.L.R. 56, 33 S.C.R. 376. In Quebec it was said in *Bell Telephone Co. v. Montreal Street R.W. Co.* (1897), 33 Can. L.J. 697, Q.R. 10 S.C. 162, 6 Q.B. 223, that the dominant purpose of a street being for public passage any appropriation of it by legislative authority to other objects will be deemed to be in subordination to this use unless a contrary intent be clearly expressed and therefore a telephone company having no vested interest in or exclusive right in the ground circuit or earth system as against a railway company duly incorporated can not recover by way of damages the cost of converting from such a system to some other system which would not be interfered with by the use of electric power by the railway company. Where an electric company was empowered under certain conditions which it fulfilled, to lay underground wires, it was held that there was an implied power to break up city streets for the purpose of doing so and the city was refused an injunction restraining them from doing so: *Montreal v. Standard, etc., Co.*, Q.R. 5 Q.B. 558, (1897) A.C. 527.

Jurisdiction of Dominion Parliament. By section 91, subsection 10, of the B.N.A. Act all works within a Province are subject to the jurisdiction of the Provincial Legislature unless they are works connecting more than one province or are declared to be works for the general advantage of Canada or of two or more provinces and the Dominion has no power to incorporate a

telephone company to do business in any single province unless it declares it to be a work for the general advantage of Canada or of two or more provinces: *Regina v. Mohr*, 7 Q.L.R. 183, 2 Cart. 257; but where a work comes within that description it is subject only to such supervision as the Parliament of Canada imposes and is not subject to municipal control unless, as is the case in the present section, such control is expressly provided for: *Toronto v. Bell Telephone Co.*, 3 O.L.R. 465, 6 O.L.R. 335. (1905) A.C. 52.

(a.) The company shall not interfere with the public right of travel, or in any way obstruct the entrance to any door or gateway or free access to any building. No interference with travel.

Formerly 62 & 63 Vict., cap. 37, sec. 1 (a). As to "the public right of travel": see *Bonn v. Bell Telephone Co.*, 30 O.R. 696, *Atkinson v. Chatham*, 29 O.R. 518, 26 A.R. 521, 31 S.C.R. 61, cited in notes to section 195, *ante*.

(b.) The company shall not permit any wire to be less than twenty-two feet above such highway or public place, nor erect more than one line of poles along any highway. Height of wires.
One line of poles.

Formerly 62 & 63 Vict., cap. 37, sec. 1(a). Prior to this enactment there was no provision regulating the height of wires above the ground. In cities wires are frequently placed at a much greater height than twenty-two feet, but no machinery is provided under these sections for compelling a company to place them at a greater height unless the municipality should make it a term of their consent to the execution of the works within its limits and in the event of refusal by the company the Board should uphold the former under sub-section 2, *infra*. There are provisions in various Municipal Acts such as 3 Edw. VII., cap. 19, sec. 559 (4) (Ont.), for regulating the erection and maintenance of electric light, telegraph and telephone poles and wires, but under such decisions as *Canadian Pacific R.W. Co. v. Notre Dame* (1899), A.C. 369, and *Toronto v. Bell Telephone Co.*, 3 O.L.R. 465, 6 O.L.R. 335, (1905) A.C. 52, these provincial statutes would not govern a work which is declared to be for the general advantage of Canada.

Descrip-
tion of
poles.

(c.) All poles shall be as nearly as possible straight and perpendicular, and shall, in cities and towns, be painted;

Formerly 62 & 63 Vict., cap. 37, sec. 1(c). The previous section had at the end of the words "if required by by-law of the council." As to the general effect of municipal regulations see notes to sub-section (b), *ante*.

Cutting
poles or
wires in
case of
fire.

(d.) The company shall not be entitled to damages on account of its poles or wires being cut by direction of the officer in charge of the fire brigade at any fire, if in the opinion of such officer, it is advisable that such poles or wires be cut.

Formerly 62 & 63 Vict., cap. 37, sec. 1(d).

No injury
to trees.

(e.) The company shall not unnecessarily cut down or mutilate any shade, fruit or ornamental tree.

The former section 62 & 63 Vict., cap. 37, sec. 1(e) read: "The company shall not cut down or mutilate any shade, fruit or ornamental tree without the approval of the corporation in which it is situate and then only so far as it may be necessary." The effect of this amendment as in sub-section (c), *ante*, is to eliminate the feature of municipal control. The right to cut trees now rests in the company absolutely, subject to their being able to show the necessity for what they do. Under a somewhat similar enactment it was held in New Brunswick that it is not sufficient for a company merely to allege that it was necessary to cut trees, it must be prepared to prove it, and failing such proof the company was liable to an action for damages and the owner was not restricted to his claim for compensation under the statute: *Gilchrist v. Dominion Telegraph Co.*, 19 N.B.R. 553, 1 Cas-sels Sup. Ct. Dig. p. 844, S.C. 20 N.B.R. 241. No provision is made for compensation for any of the works authorized by this section, and it would appear that an owner's only remedy is an action for damages where he can show negligence in the execution of the works. Section 120, *ante*, requires a company to make full compensation in the manner in this or the Special Act provided for all damages sustained by reason of the exercise of the powers conferred, but no method is prescribed by which compensation can be obtained for loss by the execution of the works now authorized.

Cutting Trees on Highways. In England the presumption is that the owner of land adjoining a highway owns the fee in the soil of the highway *ad medium filum viae*: *Salisbury v. Great Northern R.W. Co.*, 5 C.B.N.S. 174; *Mappin v. Liberty Co.*, 19 Times L.R. 51, and in some cases the same rule prevails in Canada and therefore the property in trees planted in the highway is vested in the adjoining owner who may sue for any wrongful damage to them: *O'Connor v. Nova Scotia Telephone Co.*, 23 N.S.R. 509, 22 S.C.R. 276; but many of our roads and highways were laid out by the Crown and lands granted afterwards, so that the presumption of dedication cannot arise. In these instances the freehold is usually, as in Ontario, vested in the Crown and the possession in the municipalities; 3 Edw. VII. cap. 19 (Ont.) secs. 599 and 601, and where that is the case the trees thereon belong to the municipality: *Barrie v. Gillies*, 20 U.C. C.P. 369, 21 U.C.C.P. 213, who in that case would alone have a right to sue for damages to them: *Hodgins v. Toronto*, 19 A.R. 537. Under the Tree Planting Act of Ontario (R.S.O. cap. 243), it is provided that in cases where the Act is brought into operation, persons who plant trees on streets or highways opposite their property shall own them, and in such cases where they are injured unlawfully they have a private right of action for the damage done whether the trees be of natural growth or are planted: *Douglas v. Fox*, 31 U.C.C.P. 140. Where branches of trees planted on a private owner's land extended over the highway, though the municipality might cut them on the ground that they are a nuisance, that would not justify a telephone company in doing so, unless they had the necessary statutory authority: *Hodgins v. Toronto, supra*.

(f.) The opening up of any street, square, or other public place for the erection of poles, or for carrying wires under ground, shall be subject to the supervision of such person as the municipal council may appoint, and such street, square or other public place shall, without any unnecessary delay, be restored, as far as possible, to its former condition. Supervision of municipality.

Formerly 62 & 63 Vict. cap. 37, sec. (f). This sub-section has been a good deal altered. It formerly provided that the work should be done in such a manner as the Council directed, and

that the latter might designate the place at which the poles should be erected; the words "by and at the expense of the Company" were formerly at the end of the section.

Effect of Supervision. The approval of the proper officer would not justify a breach of, or non-compliance with statutory requirements: *Bonn v. Bell Telephone Co.*, 30 O.R. 696; *Joyce v. Halifax Street R.W. Co.*, 24 N.S.R. 113; but it may be evidence of a due performance by the company of the obligations imposed by statute: *Bell Telephone Co. v. Chatham*, 31 S.C.R. 61. The necessary approval of the officer appointed to supervise the work may be evidenced by his report to council showing it to be the only method of carrying out the undertaking: *Joyce v. Halifax Street R.W. Co.*, 21 N.S.R. 531, 17 S.C.R. 709.

Surface
of street
to be re-
stored.

(g.) Whenever any city, town or incorporated village is desirous of having lines of telegraph, telephone, or for the conveyance of light, heat, power or electricity, placed under ground, the Board may, on the application of such city, town or incorporated village require the company to thus place its lines or wires under ground, and abrogate the right given by this section or by the Special Act to carry lines on poles, in such city, town or incorporated village, the whole on such terms and conditions as the Board may prescribe.

Future
legisla-
tion as to
placing
wires
under
ground.

Formerly 62 & 63 Vict. cap. 37, sec. 1 (g) amended. The former section began "In case sufficient means are devised for carrying," etc. As the section now appears, the power of the Board to order wires under ground is not limited by this condition.

Workmen
to wear
badges.

(h.) Every person employed upon the work of erecting or repairing any line or instrument of the company shall have conspicuously attached to his dress a badge, on which are legibly inscribed the name of the company and a number by which he can be readily identified.

Formerly 62 & 63 Vict. cap. 37, sec. 1 (h).

(i.) If for the purpose of removing buildings, or in the exercise of the public right of travel, it is necessary that the said wires or poles be temporarily removed, by cutting or otherwise, the company shall, at its own expense, upon reasonable notice in writing from any person requiring it, remove such wires and poles; and in default of the company so doing, such person may remove such wires and poles at the expense of the company.

Temporary removal of wires or poles.

Formerly 62 & 63 Vict. cap. 37, sec. 1 (j). In the former section the place to which the notice was to be directed was prescribed, but that is left out in the present sub-section.

(j.) The company shall be responsible for all unnecessary damage which it causes in carrying out, maintaining or operating any of its said works.

Liability for damage.

Formerly 62 & 63 Vict. cap. 37, sec. 1 (k) amended. The previous section began "The Company shall be responsible for all damage which it causes to ornamental, shade or fruit trees and otherwise for all unnecessary damage," etc., as in the above sub-section. As mentioned in the note to sub-section (e) *ante*, there is no provision for payment of damage done under these sections unless the damage is "unnecessary." The former Act by sub-section (i) provided also that a company should not under these sections enter on private property without the consent of the owner. This provision does not now appear; but on the other hand no express power to enter on lands is conferred under the provisions of section 118 (a) *ante*.

2. Provided that where the company cannot obtain such consent from such municipal council or other authority, the company may apply to the Board for leave to exercise such powers, and upon such application shall submit to the Board a plan of such highway, square, or other public place, showing the proposed location of such lines, wires, and poles, and the Board may grant such application, in whole or in part, and may change or fix the route of such lines, wires or poles, and may by order impose any terms, conditions or limitations in respect thereof

Refusal of consent by municipal authority; powers of Board.

that it deems expedient, having due regard to all proper interests; and upon such order being made the company may exercise such powers in accordance with such order, and shall in the performance and execution thereof, or in the repairing, renewing or maintaining of such lines, wires or poles, conform to and be subject to the provisions of sub-section 1 of this section, as if consent had been obtained from such municipal council or other authority, except in so far as the said provisions are expressly varied by order of the Board.

This sub-section is new. It was no doubt framed to meet such difficulties as might have arisen in the case of *Liverpool, etc. R.W. Co. v. Liverpool*, 35 N.S.R. 233, had it not been for the decision of the Supreme Court upon another point: 3 Can. Ry. Cas. 80. There, under a provincial statute, the exercise of the company's powers within a town was made subject to the control of the municipality, and the latter enacted that those powers should not be exercised until certain somewhat onerous conditions had been complied with. Under the present sub-section all such conditions in the case of companies coming within this section would be always subject to revision by the Board. The subject of unlimited municipal control over public works and highways has been discussed in an article in 21 Canadian Law Times, pp. 431 and 459.

As to sale
of light,
power,
etc.

3. Nothing contained in this section shall be deemed to authorize the company exercising the powers therein mentioned for the purpose of selling or distributing light, heat, power or electricity in cities, towns or villages, without the company having first obtained the consent therefor by a by-law of the municipality. 62-63 V., c. 37, s. 1, Am.

The limitations upon the right of a municipality to confer a franchise upon companies desiring to do business within its borders are referred to in the notes to section 195 *supra*, "Rights on highways."

Drainage.

196. The company shall in constructing the railway make Drainage and maintain suitable ditches and drains along each side of, and by com- across and under the railway, to connect with ditches, drains, pany. drainage works and watercourses upon the lands through which the railway runs, so as to afford sufficient outlet to drain and carry off the water, and so that the then natural, artificial, or existing drainage of the said lands shall not be obstructed or impeded by the railway.

This sub-section is new and had no exact counterpart in the former Railway Act. Both sections 196 and 197 should be read with section 118, sub-sections (*k*), (*l*), (*m*), and (*n*), 119 and 120 *ante*. Taken together the effect is that by section 118 (*k*) a railway company may construct across, under or over any river, stream, watercourse or canal which it intersects or touches, such of the various works there enumerated as may be necessary for the proper working of the railway; by section 118 (*l*) it may divert temporarily or permanently the course of any river, stream or watercourse, or raise or sink the level thereof in order the more conveniently to carry the same over, under or by the side of the railway: by section 118 (*m*) the company may make drains or conduits into, through or under any lands adjoining the railway for the purpose of conveying water from or to the railway, and by section 118 (*n*) it may divert or alter the position of any waterpipe, sewer or drain.

Section 119 requires the company to restore as nearly as possible to its former state any river, stream, watercourse. . . . waterpipe . . . sewer or drain . . . which it diverts or alters, or it shall put the same in such a state as not materially to impair its usefulness; and by section 120 the company, in the exercise of these or other powers, must do as little damage as possible and shall make full compensation in the matter herein and in the Special Act provided to all parties interested for all damage by them sustained by reason of the exercise of such powers. The method of acquiring lands and fixing compensation prescribed by the Act therefore applies to the diversion or obstruction of any stream, drain or watercourse rendered necessary by the construction of the railway; and accordingly where a

company desires to divert or obstruct, it must file the necessary plans and take all proceedings required in the case of interference with private or public lands, highways or other property: *Arthur v. Grand Trunk R.W. Co.*, 25 O.R. 37, 22 A.R. 89; and the mere fact that upon the general right of way plan approved by the authorities a proposed diversion is shown, would not authorize such diversion to the prejudice of individual rights unless such a course was expressly authorized by statute, or the person interested had been duly notified and received compensation for any private injury inflicted: *The Queen v. Wycombe R.W. Co.*, L.R. 2 Q.B. 310; but where a company has diverted (*ultra vires*) a highway but with a *bona fide* view to the convenience of the public, a Court of Equity will not compel it to replace the road if that will cause greater inconvenience than the unauthorized diversion, but will leave it open to the Attorney-General to proceed at law if so advised: *Attorney-General v. Ely*, L.R. 6 Eq. 106, 4 Ch. App. 194. A company would not be allowed to make a diversion (under the English Statute) merely because it would diminish the expense to which the company might be put under the terms of that statute (8 Viet. cap. 20, sec. 16), such a diversion must be actually necessary for the construction of the railway: *Pugh v. Golden Valley R.W. Co.*, 12 Ch. D. 274. In *Graham v. Northern R.W. Co.*, 10 Gr. 259, it was decided upon principles somewhat similar to those invoked in *Attorney-General v. Ely*, that the mere fact that a riparian proprietor had recovered damages at law for an interference with a stream would not entitle him to an injunction upon an appeal to the discretionary jurisdiction of a Court of Equity where the damages were merely nominal and the balance of convenience was greatly in favour of the company: see also *Poudrette v. Ontario, etc., R.W. Co.*, 11 L.N. 130. Where a company in an attempt to prevent an interference with a drain or watercourse negligently or improperly constructs a ditch, drain or culvert so that damage is done to other landowners, an action will lie at common law based upon this negligent act, and the injured party is not compelled to seek compensation under the statute: *Vanhorn v. Grand Trunk R.W. Co.*, 9 U.C.C.P. 264; *Anderson v. Great Western R.W. Co.*, 11 U.C.R. 126; Abbott *Railway Law of Canada*, 240, 241, 242, and a similar result has been arrived at in England: *Lawrence v. Great Northern R.W. Co.*, 16 Q.B. 643; see also *Simoneau v. The Queen*, 2 Ex. C.R. 391; *Morin v. The*

Queen, 2 Ex. C.R. 396, 20 S.C.R. 515, and even where defendants might not be bound to construct a ditch to carry off surface water, yet if they assume to do so and construct it so carelessly that the flow is impeded and damage results, the plaintiff will be entitled to recover: *Utter v. Great Western R.W. Co.*, 17 U.C.R. 392; and where a drain was so negligently constructed that water flooded a highway, a municipality charged with its repair was permitted to recover for the special injury inflicted: *Sarnia v. Great Western R.W. Co.*, 17 U.C.R. 65. A declaration that defendants negligently, wrongfully and injuriously placed earth in a ditch so as to obstruct it, was upheld in *Alton v. Hamilton, etc., R.W. Co.*, 13 U.C.R. 595. Where defendants constructed a culvert too small to carry off water brought down by drains made before the railway passed through, it was held liable for damages resulting from an overflow: *Carron v. Great Western R.W. Co.*, 14 U.C.R. 192. Where no negligence or improper construction is shown and the damage is due solely to a reasonable exercise of the powers conferred upon the railway company, the owner of adjoining lands cannot recover damages, as such an injury should have been foreseen and compensation for it claimed under the statute when the railway was constructed: *L'Esperance v. Great Western R.W. Co.*, 14 U.C.R. 173; and see *Nichol v. Canada Southern R.W. Co.*, 40 U.C.R. 583; and a purchaser of lands injured by the backing up of water owing to a railway embankment, cannot recover damages for what should have been the subject of a claim for compensation at the time the railway was built: *Knapp v. Great Western R.W. Co.*, 6 U.C.C.P. 187; *Wallace v. Grand Trunk R.W. Co.*, 16 U.C.R. 551; but it is not assumed merely because a person has a statutory right to carry on irrigation works that he may do so in a manner to prejudice the rights of others, such a right must clearly appear from the provisions of the statute: *Canadian Pacific R.W. Co. v. Parke* (1899), A.C. 535, reversing 6 B.C.R. 6; *Tolton v. Canadian Pacific R.W. Co.*, 22 O.R. 204, and where the company having no authority to divert a watercourse, claimed to have agreed with the previous owner to do so and to have paid him compensation therefor, it was held that under the Ontario Registry Act the equitable easement to divert thereby created would not avail as against a subsequent purchaser without notice: *Tolton v. Canadian Pacific R.W. Co.*, *supra*. Where a diversion is made without complying with the terms of the statute authorizing it, the

owner is entitled to damages in an action based upon the permanent injury done him: *Arthur v. Grand Trunk R.W. Co.*, 25 O.R. 37, 22 A.R. 89. In the Divisional Court it was said that it was the original diversion and not the resulting damages which gave the cause of action, and therefore it would appear that the limitation of time for bringing an action under section 242, *infra*, would run from the date of the diversion, but though such cases as *Knapp v. Great Western R.W. Co.*, 6 U.C.C.P. 187, and *Glen v. Grand Trunk R.W. Co.*, 2 P.R. 377, would seem to bear this out, the decisions in *McGillivray v. Great Western R.W. Co.*, 25 U.C.R. 69, and *Carron v. Great Western R.W. Co.*, 14 U.C.R. 192, lead to the conclusion that time begins to run from the date of the damage done by the overflow, although apparently under those cases only such damages can be recovered as have been suffered during the period of that limitation. Generally speaking, a person is not liable for obstructing the flow of surface water as distinguished from water flowing in a defined channel: *Crewson v. Grand Trunk R.W. Co.*, 27 U.C.R. 68; *Nichol v. Canada Southern R.W. Co.*, 40 U.C.R. 583; but where a landowner has arranged for the disposal of surface water by means of artificial drains and these are obstructed by the railway company, the proceedings for arbitration and expropriation must be invoked and compensation made by the latter for all interference with such drains: *Arthur v. Grand Trunk R.W. Co.*, *supra*. In this case it has been held by the Court of Appeal that if water precipitated from the clouds in the form of rain or snow forms for itself a visible channel and is of sufficient volume to be serviceable to the persons through or along whose land it flows, it is a watercourse, and for its diversion an action will lie. In Manitoba a watercourse is said to consist of bed, banks and water, and while the flow of the water need not be continuous or constant, the bed and banks must be defined and distinct enough to form a channel or course that can be seen as a permanent landmark on the ground: *Wilton v. Murray*, 12 Man. L.R. 35. The general subject of what constitutes "surface water" as distinguished from a watercourse is discussed in *Ostrom v. Sills*, 24 A.R. 526, 28 S.C.R. 485, and it is laid down by the Court of Appeal, and affirmed by the Supreme Court, that an occupant or owner has no right to drain into his neighbours' land the surface water from his own land not flowing in a defined channel, see also on this subject *Young v. Tucker*, 26 A.R. 162;

Hamelin v. Bannerman, 31 S.C.R. 534; *Ward v. Grenville*, 32 S.C.R. 510. Sub-section 1, of section 196, will of course render it more than ever necessary that a railway company should take care of all water brought down upon its land by ditches or drains at the time the railway is constructed. Where land is injured by the unlawful flow of water from another's land, the owner may erect works necessary to keep it off and is liable for damages neither to the person from whose lands such water flows nor to anyone to whose land it is diverted by reason of his preventive measures: *Canadian Pacific R.W. Co. v. McBryan*, 5 B.C.R. 187, 6 B.C.R. 136, 29 S.C.R. 359; *Ostrom v. Sills*, *supra*; *Hornby v. New Westminster, etc. R.W. Co.*, 35 Can. L.J. 653, 6 B.C.R. 589; but where the railway company instead of merely keeping water off its own lands, constructs ditches so as to convey it to another's, they were held, in Quebec, to be liable for resulting damages: *Grand Trunk R.W. Co. v. Miville*, 14 L.C.R. 469.

2. Whenever any lands are injuriously affected by reason of the drainage upon, along, across, or under the railway being insufficient to drain and carry off the water from such lands, or whenever any municipality or landowner desires to obtain means of drainage, or the right to lay water pipes or other pipes, temporarily or permanently, through, along, upon, across or under the railway or any works or land of the company, the Board may, upon the application or complaint of the municipality or landowner, order the company to construct such drainage or lay such pipes, and may require the applicant to submit to the Board a plan and profile of the portion of the railway to be affected, or may direct an inspecting engineer, or such other person as it deems advisable to appoint, to inspect the locality in question and, if expedient, there hold an inquiry as to the necessity or requirements for such drainage or pipes, and to make a full report thereon to the Board; the Board may upon such report, or in its discretion, order how, where, when, by whom, and upon what terms and conditions, such drainage may be effected, or pipes laid, constructed and maintained, having due regard to all proper interests. 51 V., c. 29, s. 14, Am.

This embodies the provisions of section 14 of the Act of 1888, but with considerable alterations and additions. In its original form it applied to streets as well as to drains, and under it the case of *Grand Trunk R.W. Co. v. Toronto*, 1 Can. Ry. Cases 82, was decided holding (1) that the Railway Committee had power to determine whether it was necessary that the proposed works (in this case a street) should be made and to direct how and on what terms it might be made; (2) that the municipality might thereupon construct the work necessary to carry out such directions, but subject to the conditions imposed by the Railway Committee, and (3) that the construction of the work must be under the supervision of such officials as the Railway Committee might appoint; but it did not authorize the Committee to order the construction of a work different from those provided for by the section, nor did it authorize that body to delegate its functions to a municipality or to any officer. The scope of the section provides a summary method of executing drainage work under the authority of the Board and provides relief in such cases as those where a municipality desires to carry out such works, but finds itself blocked by a Dominion Railway which but for the provisions of section 197 *infra*, cannot be affected by Provincial Drainage Acts or works undertaken under the authority of such Acts which will have the effect of interfering with the structure of the railway. It has been decided in *Miller v. Grand Trunk R.W. Co.*, 45 U.C.R. 222, and *McCrimmon v. Yarmouth*, 27 A.R. 636, that such statutes do not apply to railways subject to the jurisdiction of the Federal Parliament; hence the necessity for such relief. Where, however, Provincial Acts are not designed to interfere with the permanent structure of a Dominion Railway, but only provide a method of restoring drains upon its lands to their original condition by cleaning them out, such legislation is binding upon the railway and the cost of doing such work may be levied upon it by a municipality: *Canadian Pacific R.W. Co. v. Notre Dame de Bonsecours*, Q.R. 7 Q.B. 121, (1899), A.C. 367; and such a railway company in Quebec is not only subject to the provisions of provincial and municipal legislation respecting the maintenance of its ditches or drains, but is entitled to any corresponding benefits conferred upon the owners of such ditches by the Quebec Civil Code: *Duhaime v. Grand Trunk R.W. Co.*, Q.R. 16 S.C. 121. This section does not purport to render such companies

liable to provincial legislation to any greater extent than heretofore, but merely enables the Board to facilitate the carrying out of any drainage scheme inaugurated under such legislation by exercising the powers conferred by this section. It will be seen, however, that by the next section a step in advance has been taken, and an attempt has been made to give provincial legislatures authority over Canadian railways, so far as the subject of drainage works is concerned.

197. Whenever by virtue of any Act of any province through which the railway runs, proceedings may be had or taken by any municipality or landowner for any drainage, or drainage works, upon and across the property of any other landowner in such province, the like proceedings may be had or taken by such municipality or landowner for drainage or drainage works upon and across the railway and lands of the company, at the option of such municipality or landowner, in the place of the proceedings before the Board as in the next preceding section provided, and thereupon the drainage laws of the province shall apply to the lands of the company upon or across which such drainage is required, to the same extent as to the lands of any landowner of such province, subject, however, to any previous order or direction of the Board made or given with respect to drainage of the same lands, and provided that the company shall have the option of constructing the portion of any drain or drainage work required to be constructed upon, along, under or across its railway or lands, and in the event of the company not exercising such option and completing such work within a reasonable time, without any unnecessary delay, such work may be constructed or completed in the same manner as any other portions of such work are provided under the laws of such province to be constructed; provided always that no drainage works shall be constructed or reconstructed upon, along, under or across the railway or lands of the company until the character of such works or the specifications or plans thereof have been first submitted to and approved of by the Board. 63-64 V., c. 23, s. 2, Am.

Drainage
proceed-
ings
under
Pro-
vincial
Acts.

Approval
of Board.

This legislation was first enacted in 1900, by 63-64 Vict., cap. 23 (D.), but was limited to conferring power upon the Railway Committee to order the company to construct such drainage works as the Committee might think necessary for the due execution, so far as the railway lands were concerned, of the proposed drainage scheme. The new section goes further still and enacts that where the Board has made no order under the preceding section, and the railway refuses to voluntarily construct the necessary works on its lands, the authors of the drainage scheme may construct it upon railway lands under the authority of and in the manner prescribed by the provincial statute, subject, however, to the approval of the Board. In so far as the Dominion Parliament has thus delegated its functions to the Provincial Legislatures, a principle, which appears to be entirely novel under the B. N. A. Act, has been introduced; namely, the delegation to the Provinces of legislative powers conferred exclusively upon the Dominion by the statute in question. It remains to be seen, whether such a delegation of legislative functions to another, but in no sense a subordinate legislative body, is within the power of the Federal Parliament. It would appear to be essentially different from the delegation of limited powers to one of its own officers or subordinate bodies, and resembles rather the transfer of its jurisdiction to an alien sovereign power such as a foreign country, or to some other colony which exercises the functions of the sovereign within a more or less restricted legislative sphere. The constitutional aspect of this section may yet create an interesting discussion.

Costs.

2. The proportion of the cost of the drain or drainage works across or upon the railway to be borne by the company shall in all such cases be based upon the increase of cost of such work caused by the construction and operation of the railway. (New.)

This sub-section so far as the Province of Ontario is concerned, applies to Dominion railways brought within the provisions of provincial drainage Acts, a principle less favourable to the company than exists in the case of railways which are subject only to the jurisdiction of the Province. Sections 9 and 10 of the Railway Ditches and Watercourses Act, R.S.O. 1897 cap. 286, are as follows:

“ 9. In any case where the engineer of the municipality reports that any existing bridge or culvert in the roadbed of any railway has to be enlarged by the deepening or widening of the same, or that a new bridge or culvert is required, . . . then all such deepening or widening or construction shall be performed by the railway company and by their employees, and at the cost of the municipality in the first instance, said cost to be collected from and paid for by the owners, who will be liable for the same, as provided for in the said sections 27 and 30 of *The Ditches and Watercourses Act*.”

“ 10. The railway company shall not be liable for the cost of any work performed upon the lands or under the roadbeds of any railway under the provisions of this Act.” From these quotations it will be seen that where railway bridges or culverts must be enlarged for the purpose of accommodating an increased flow of water, the expense must be borne by the municipality. Under this sub-section of section 197, a proportion of the cost must be borne by the railway company based upon the increase of cost of the work caused by the construction and operation of the railway.

Farm Crossings.

198. Every company shall make crossings for persons across ^{Farm} whose lands the railway is carried, convenient and proper for ^{crossings.} the crossing of the railway for farm purposes. In crossing with live stock, the same shall be in charge of some competent person, who shall use all reasonable care and precaution to avoid accidents. 51 V., c. 29 s. 191, Am.

2. The Board may, upon the application of any landowner, ^{Neces-} order the company to provide and construct a suitable farm cross- ^{sary} ing across the railway, wherever in any case the Board deems it ^{crossings} necessary for the proper enjoyment of his land, on either side ^{may be} of the railway, and safe in the public interest; and may order ^{ordered} and direct how, when, where, by whom, and upon what terms ^{by Board.} and conditions, such farm crossing shall be constructed and maintained.

This section is much more precise than its counterpart in the Act of 1888. It shows that the crossing is intended for "farm purposes," and in express terms imposes upon the owner of cattle crossing with live stock, a duty to place them in charge of some competent person and to use reasonable care.

Farm Crossings defined. Though this term has been employed in railway acts since 14 & 15 Vict. cap. 51, it has never been defined by legislation, nor though called a *farm crossing* has it been limited in its scope to farm purposes until the enactment of the present section. In *Reist v. Grand Trunk R.W. Co.* 6 U.C.C.P. 421, at p. 423, Draper, C.J., says: "The word may include a passage across and upon a railway itself—a crossing at grade or a bridge over—or a tunnel under the railway," and in *Burke v. Grand Trunk R.W. Co.*, *ibid.*, at p. 486, he repeats this definition.

When Right to Crossing Arises. There is at common law no right to a crossing upon a severance of the land, and unless given by statute the owner cannot require it at the hands of a railway company, nor can the latter force it upon the owner in mitigation of damages for a severance, and consequently where no statutory provision for a crossing exists, full compensation for the severance of the land should be granted: *Vézina v. The Queen*, 17 S.C.R. 1; *Guay v. The Queen*, *ib.* 30. The case of *Canada Southern R.W. Co. v. Clouse*, 13 S.C.R. 139, was formerly regarded as an authority to the contrary, but in *Ontario, etc., Co. v. Canada Southern R.W. Co.*, 1 Can. Ry. Cases, 17, it was held by Meredith, J., that the *Clouse Case* was in effect overruled by the *Vézina* and *Guay* cases, and that *Brown v. Toronto, etc., R.W. Co.*, 26 U.C.C.P. 206, holding that there was no common law right to a crossing, has been approved, and followed in preference to *Canada Southern R.W. Co. v. Clouse*. The earlier legislation respecting farm crossings was all considered in *Ontario, etc., Co. v. Canada Southern R.W. Co.*, and it was there decided that prior to the statute of 1888, there had been no statutable obligation on a railway company to provide and maintain farm crossings and that as that statute was not retroactive, no one whose lands had been severed prior to 1888 could demand a crossing. It is to be observed that by sub-section 2, of section 198, of the present Act, the Board may order the erection of farm crossings wherever it deems it necessary for the proper enjoyment of the land so that there now appears

to be a means whereby a farm crossing can be forced upon the railway, even though the right to one did not previously exist. As under the cases already cited, the compensation paid for taking the land is deemed to include damages done to it by severance, questions may sometimes arise whether the land owner should retain the compensation paid him or his predecessors for this feature of the expropriation and also compel the company to bear the expense of making and maintaining a farm crossing. A question sometimes comes up whether a purchaser of a portion of lands severed by the railway can compel the company to give him a crossing for the piece he has bought, when the owner of the remainder of the land continues in the enjoyment of the crossing that formerly served for both parcels. In *Grand Trunk R.W. Co. v. Huard*, Q.R. 1 Q.B. 501, it was held that the railway company was governed in the matter of crossings by the Railway Clauses Act, 14 & 15 Vict., cap. 51, which was incorporated in its charter, 16 Vict., c. 37, and that under that Act it was its duty to construct crossings for each lot of land traversed by the railway, whether or not such lots were sub-divisions of lands originally expropriated, and that the compensation made at the time of expropriation of the original lot could not be regarded as sufficient indemnity for a lack of crossings upon a future sub-division of the lots. This subject is dealt with in Abbott's Railway Law, pp. 256, 257, 258, and he arrives at the conclusion that crossings must be given upon a sub-division of the lands, but the decision in *Ontario, etc., Co. v. Canada Southern R.W. Co.*, 1 Can. Ry. Cases 17, rendered five years after the publication of this work lays down the opposite rule and the law laid down in this case, would probably be accepted in provinces other than Quebec. It has been followed in Ontario in *Carew v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cases 241. In England crossings must be supplied as the lands become more and more subdivided: *United Land Co. v. Great Eastern R.W. Co.*, 10 Ch. App. 586, but the wording of the English statute (8 Vict., cap. 20, sec. 68) is entirely different from ours, and fully justifies a different conclusion. Where land has been conveyed so that the purchaser cannot get out without crossing railway lands, a way of necessity was offered by the Railway Company, but was refused by plaintiffs in *Ontario, etc., Co. v. Canada Southern R.W. Co.*, and it was not decided by Meredith, J., whether plaintiffs would be legally entitled to it.

As the purchaser did not acquire his land from the railway company, but from another vendor, it is difficult to see how he could claim a way of necessity. Generally such a right is only preserved where one person conveys to another land which the purchaser has no means of reaching except over the vendor's property: *Wilkes v. Greenway*, 6 Times L.R. 449; *Eckroyd v. Coulthard* (1897) 2 Ch. 554; *Grand Trunk R.W. Co. v. Valliear*, 2 Can. Ry. Cases, 245. 3 Can. Ry. Cases 399, and see notes on "Farm Crossings," 3 Can. Ry. Cas., pp. 202 and 203. Where an owner sold land to a company thus severing his own property and reserved no right of way across, it was held that he had no right to a way of necessity because he could pass from one portion of his lands to another by means of a highway adjoining them both: *Carroll v. Great Western R.W. Co.*, 14 U.C.R. 614.

Grant of Crossing over Railway. Though a person may validly agree with a company buying a right of way from him to reserve from his grant a crossing over the railway property: *Ontario, etc., R.W. Co. v. Philbrick*, 12 S.C.R. 288, yet the company will not be bound by an agreement for a crossing over its land made on its behalf by its solicitors: *Doran v. Great Western R.W. Co.*, 14 U.C.R. 403; *Wood v. Hamilton, etc., R.W. Co.*, 25 Gr. 135, nor by its engineer: *Cameron v. Wellington, etc., R.W. Co.*, 28 Gr. 327; nor can a company itself after the land has been impressed with its character of right of way, sell or give away a right to cross, as it has no power to use the lands for other purposes than those for which it was empowered to take them, unless it can be shown that they are superfluous and not required for the purposes of its undertaking: *Mulliner v. Midland R.W. Co.*, 11 Ch. D. 611; *Great Western R.W. Co. v. Solihull*, 86 L.T. 852; 18 Times L.R. 707; nor can a right to a level crossing or undercrossing over a railway be acquired by prescription, because such prescription rests upon the presumption of a lost grant and the railway company would have no power to make any such grant: *Guthrie v. Canadian Pacific R.W. Co.* 1 Can. Ry. Cas. 1; *Canadian Pacific R.W. Co. v. Guthrie*, *ib.* 9; *Grand Trunk R.W. Co. v. Valliear*, 3 Can. Ry. Cas. 399, reversing *Boyd, C.*, reported 2 *ibid.*, 245. The right to a farm crossing depends upon the ownership of lands on both sides of the railway, and so the owner of lands on one side only, cannot compel the company to allow him to cross the railway for the purpose of reaching another person's lands on the other side: *Grand Trunk R.W. Co. v. Therrien*, 30 S.C.R. 485, and

where the owner of lands on both sides of a railway being in enjoyment of a crossing, sells the land on one side to another without reserving a right of way over the crossing, neither the vendor nor purchaser may use the crossing and the company is entitled to close it up: *Midland R.W. Co. v. Gribble* (1895), 2 Ch. 129, 827; nor will a federal railway company be bound by provincial legislation requiring it to open crossings on the application of any owner present or future: *Grand Trunk R.W. Co. v. Therrien, supra*. Where, however, a railway company was released by the owner from its obligation to maintain a crossing, it was held that a tenant in occupation at the date of the release, was entitled to insist upon its maintenance for his purposes during the currency of his lease: *Corry v. Great Western R.W. Co.*, 7 Q.B.D. 322. The right to have a farm crossing being an easement, does not pass by parol but must be evidenced by deed, if a claim to it is to be enforced: *Mills v. Hopkins*, 6 U.C.C.P. 138. Special damages for breach of covenant to construct a crossing must be specially pleaded, and the covenantor's attention must be drawn to such special damages when the contract is made, if the covenantee is to recover them: *Shaver v. Great Western R.W. Co.*, 6 U.C.C.P. 321.

Persons who may Use Crossings. A person may be entitled to a farm crossing if he is *bona fide* entitled to the land severed, even though he may have no legal claim to it: *Bolduc v. Canadian Pacific R.W. Co.*, 3 Can. Ry. Cases 197, which is similar in principle to *Davis v. Canadian Pacific R.W. Co.*, 12 A.R. 724. A person using a crossing at the invitation of the owner, has a right to do so, is not a trespasser, and may recover damages for negligence on the railway's part while he is so using it: *Plester v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cases 27.

Mode of User Under the Act of 1888, section 191, it was doubtful whether the crossing could be used for other than "farm purposes," and though the question was raised in *Plester v. Grand Trunk R.W. Co.*, *supra*, it was not decided. The present section expressly limits the user to "farm purposes," so that there can be no doubt about it. In the *Plester* case it was decided that it was within the term "farm purposes" to haul gravel taken from a part of the farm to a highway where it was to be deposited. This case seems to be hardly in accord with *Great Northern R.W. Co. v. McAllister* (1897), 1 I.R. 587, not cited

in the judgment, where it was held that the owner of a farm crossing used for farm purposes only had no right to draw stones taken from a newly opened quarry, across it by means of a traction engine and waggons. In *Great Western R.W. Co. v. Talbot* (1902), 2 Ch. 759, it was decided that the owner of a crossing under an agreement had no right to increase the burden of traffic upon it by drawing not only his own goods over it but the goods of other persons brought upon his land.

Construction and Maintenance. A provincial Act requiring the construction of farm crossings cannot bind a dominion railway: *Grand Trunk R.W. Co. v. Therrien*, 30 S.C.R. 485, following *Canadian Pacific R.W. Co. v. Notre Dame de Bonsécours* (1899), A.C. 367. No provision existed in former Acts for deciding upon the place and mode of crossing, and the landowner could not compel the railway to build a particular kind of crossing nor to put it at a particular spot, nor could the railway company force upon the owner any particular kind of crossing at any particular spot. It was simply the duty of the railway company to construct a reasonably fit and proper crossing, leaving it afterwards to be decided by the Court or a jury whether this duty had been fulfilled: *Reist v. Grand Trunk R.W. Co.*, 6 U.C.C.P. 421; *Burke v. Grand Trunk R.W. Co.*, *ibid.* 484. This crossing should be constructed by the railway company upon its own land without delay and without waiting for permission from the landowner to enter on his land for the purpose of completing it: *Reist v. Grand Trunk R.W. Co.* (in appeal), 15 U.C.R. 355. Whether a company would have any right to enter on an owner's land to construct approaches there was not decided in that case, but it has been held in *Palmer v. Michigan Central R.W. Co.*, 2 Can. Ry. Cas. 239, 3 *ibid.* 194, that the company is not justified in entering on private lands to repair the approaches there, and that consequently there is no duty laid on it to make repairs off its own lands. There appears to be a distinction between the duty to repair approaches to highway crossings and bridges and approaches to farm crossings: see 3 Can. Ry. Cas. 201 and 202, and notes to section 189 *ante*.

Duties of Landowners and Railways at Crossings. In addition to repairing that part of the crossing on its own premises, the railway company must exercise due care in approaching a level farm crossing so that it may avoid injuring the owner or his property, so far as the exercise of reasonable care will permit;

but, apart from statute, the owner must also exercise reasonable care not to obstruct the movement of trains or to incur damage to his person or property. These reciprocal duties are fully discussed in *Bender v. Canada Southern R.W. Co.*, 37 U.C.R. 25. The statute now lays down certain duties which the landowner must perform, but this is probably little more than a statement of the law as declared in such cases as *Bender v. Canada Southern R.W. Co.* and *Hurd v. Grand Trunk R.W. Co.*, 15 A.R. 58. Cattle passing over a farm crossing must now be "in charge" of some competent person. This expression has been considered in cases decided under section 271 of the Act of 1888, and was discussed in 1 Can. Ry. Cas. 442 and 443. Its interpretation must depend upon the circumstances of each case and is no doubt a question of fact for the jury: *Thompson v. Grand Trunk R.W. Co.*, 22 A.R. 453. The mere presence of attendants who are not numerous or experienced enough to exercise an effective control would not be sufficient: see *Thompson v. Grand Trunk R.W. Co.*, 18 U.C.R. 92, and *Cooley v. Grand Trunk R.W. Co.*, *ibid.* 96; but where there is sufficient control for ordinary purposes, there may be cases in which the fright caused by something improper in the management of the train will render the cattle unruly so that no ordinary agency can look after them: *Styles v. Michigan Central R.W. Co.*, 18 Can. L.T. 5; *Duffield v. Grand Trunk R.W. Co.*, 31 Can. L.J. 667; and *per Gwynne, J., Grand Trunk R.W. Co. v. James*, 1 Can. Ry. Cas., at p. 427.

Enforcement of Right to Crossing. By section 198, sub-section 2, *supra*, the Board of Railway Commissioners has power to prescribe when, where and how a farm crossing is to be constructed. As illustrating the principles which have formerly governed Courts in such matters, some cases already decided may be usefully mentioned. In *Martin v. Maine Central R.W. Co.*, 1 Can. Ry. Cas. 31, it was held in Quebec that where the value of a piece of land cut off by a railway was so small that it did not justify the expense of a farm crossing, the Court in its discretion would allow compensation to the owner in lieu of a crossing. In *Re Reist v. Grand Trunk R.W. Co.*, 12 U.C.R. 675, it was held that the Court would not on an application of the owner for a mandamus designate a particular spot at which it should be placed, but the owner might sue for damages for failure to furnish a crossing pursuant to its statutory duty: *Burke v. Grand Trunk R.W. Co.*, 6 U.C.C.P. 484. See also *Reist v. Grand*

Trunk R.W. Co., *ib.* 421, S.C. 15 U.C.R. 355. In spite of the fact that this section vests in the Board of Railway Commissioners full power to deal with the question of farm crossings, it would appear from the terms of section 294, *infra*, that the owner's right of action for damages for failure to furnish the statutory crossing may still subsist.

Fences, Gates and Cattle-guards.

Fences, etc., to be kept up. 199. The company shall erect and maintain upon the railway fences, gates and cattle-guards, as follows:—

Fences. (a.) Fences of a minimum height of four feet six inches on each side of the railway.

Gates. (b.) Swing gates in such fences, of the minimum height aforesaid, with proper hinges and fastenings, at farm crossings; provided that sliding or hurdle gates, already constructed, may be maintained.

Cattle-guards. (c.) Cattle-guards, on each side of the highway, at every highway crossing at rail-level by the railway. The railway fences at every such crossing shall be turned into the respective cattle-guards on each side of the highway.

To be suitable. 2. Such fences, gates and cattle-guards shall be suitable and sufficient to prevent cattle and other animals from getting on the railway.

If lands are not settled and inclosed. 3. Whenever the railway passes through any locality in which the lands on either side of the railway are not improved or settled, and inclosed, the company shall not be required to erect and maintain such fences, gates and cattle-guards unless the Board otherwise orders or directs. 51 V., c. 29, s. 194, and 55-56 V., c. 27, s. 6, Am.

In order to understand the changes made by this section, it becomes necessary to consider the law in force under the Act of 1888, section 194, as amended by 53 Vict., cap. 28, sec. 2 (Dom.). The cases in Ontario, Manitoba, and New Brunswick at least, and generally speaking the cases in Quebec, have followed the decisions in England under a corresponding but not verbally similar statute, 8 Vict., cap. 20, sec. 68.

In England at common law there is not, and never was, any duty on the part of the landowner to fence against cattle belonging to others, and each owner was bound to keep his own cattle in: *Dovaston v. Payne*, 2 H.Bl. 527; *Pomfret v. Rycroft*, 1 Wms. Saunders 322 A. Relying on these decisions, and on the general rule enunciated in *King v. Pease*, 4 B. & Ad. 30, that railways when lawfully authorized to operate are not subject to any liability beyond the ordinary liability at common law, except where the Legislature has seen fit to impose it, the Court of Common Pleas in England, in an elaborate judgment, decided that railways were not liable to the owners of cattle killed on their tracks unless they belonged to an adjoining property owner, and escaped owing to the company's neglect to fence: because the English statute already referred to, imposing the duty to fence, merely provided for the protection of the owners or occupants of adjoining lands and not for the protection of the owners of cattle trespassing upon land adjoining a railway, and the latter therefore were not within the protection of the statute: *Ricketts v. East and West India Dock, etc., R.W. Co.*, 12 C.B. 160; *Dixon v. Great Western R.W. Co.* (1896), 2 Q.B. 333, (1897), 1 Q.B. 300; *Luscombe v. Great Western R.W. Co.* (1899), 2 Q.B. 313.

The first General Railway Act of Canada, 14 & 15 Vict., cap. 51, secs. 12 and 13, having similar provisions, the Courts in Ontario, when the point arose there in 1857, followed the *Ricketts'* case in *Dolrey v. Ontario, etc., R.W. Co.*, 11 U.C.R. 600, and that has remained the law down to the present time, with the exception of certain cases that will be mentioned hereafter, decided under the amendment, 53 Vict., cap. 28, sec. 2. Therefore, where cattle are pasturing on lands adjoining the railway without the owner's permission, and escape thence to the track and are killed or injured, the owner of the cattle cannot recover: *Auger v. Ontario, etc., R.W. Co.*, 16 U.C.R. 92; same case, 9 U.C.C.P. 164; *Wilson v. Northern Ry. Co.*, 28 U.C.R. 274; *Gillis v. Great Western R.W. Co.*, 12 U.C.R. 427; *Connors v. Great Western R.W. Co.*, 13 U.C.R. 401; *Elliott v. Buffalo, etc., R.W. Co.*, 16 U.C.R. 289; *Ferguson v. Buffalo, etc., R.W. Co.*, *ib.* 296; *Henderson v. Grand Trunk R.W. Co.*, 20 U.C.R. 602; *Brown v. Grand Trunk R.W. Co.*, 24 U.C.R. 350; *McIntosh v. Grand Trunk R.W. Co.*, 30 U.C.R. 601; *Douglass v. Grand Trunk R.W. Co.*, 5 A.R.

585; *Daniels v. Grand Trunk R.W. Co.*, 11 A.R. 471; *Conway v. Grand Trunk R.W. Co.*, 12 A.R. 708; *Duncan v. Canadian Pacific R.W. Co.*, 21 O.R. 355.

A similar rule has been adopted in Manitoba in *McFie v. Canadian Pacific R.W. Co.*, 2 Man. L.R. 6; *Westbourne Cattle Co. v. Manitoba, etc., R.W. Co.*, 6 Man. L.R. 533; *MacMillan v. Manitoba, etc., R.W. Co.*, 4 Man. L.R. 220; *Ferris v. Canadian Pacific R.W. Co.*, 9 Man. L.R. 501. The *Westbourne Cattle Case* gives a full history of the legislation and the Ontario cases on the subject down to 1894.

In Quebec, after some little dispute, a similar rule was adopted: *Abbott on Railway Law*, 397, *et seq.*; *Morin v. Atlantic etc., R.W. Co.*, 12 L.N. 90; and *Canadian Pacific R.W. Co. v. Cross*, Q.R. 3 Q.B. 170. This last case reviewed the earlier Quebec and Ontario decisions. In a recent case in Quebec of the *Quebec Central R.W. Co. v. Pellerin*, Q.R. 12 K.B. 152, the Court of King's Bench appears to decide that section 194 of the Act of 1888 referred to in the head note as section 179, imposes upon the railway company a duty to fence in the interests of the public, and not only for the benefit of the adjoining property-holders. This appears to be a departure from the rule in force for many years in England and Ontario. The subject has been dealt with in a number of cases, such as *Brown v. Grand Trunk R.W. Co.*, 24 U.C.R. 350, where Chief Justice Draper says: "We see no obligation so far imposed by law upon the defendants to erect fences for any other purpose than to separate their railway lands taken for the use of it from the lands adjoining thereto." See also the remarks of Patterson, J., in *Douglass v. Grand Trunk R.W. Co.*, 5 A.R. 585, at page 591.

The English decisions have been uniformly to the same effect, and in *Buxton v. North Eastern R.W. Co.*, L.R. 3 Q.B. 549, it has been held that a passenger who has been injured in consequence of cattle straying upon the track cannot base his action on liability arising under section 68, of 8 Viet., cap. 20 (Imp.), but he must prove some negligence on the part of the company.

In New Brunswick, under a local statute, which required the erection of fences without regard to the particular claims of the adjoining proprietor, it was held that persons other than the proprietor of adjoining lands might sue for cattle killed or injured owing to a defect in the fences: *St. John, etc., R.W. Co.*

v. *Montgomery*, 21 N.B.R. 441. Under the Dominion Railway Act of 1888 and previous consolidations, the law in New Brunswick appears to be the same as in Ontario and Manitoba: *Levesque v. New Brunswick R.W. Co.*, 29 N.B.R. 588. This case also decides that if cattle are killed by a train owing to defective fencing, that is damage done by reason on the railway, and an action must be brought within the time limited by section 242, *infra*. In *Grand Trunk R.W. Co. v. James*, 31 S.C.R. 420, 1 Can. Ry. Cas. 422, it has been held that a railway company is under no obligation to erect or maintain fences on each side of a culvert crossing a watercourse passing under the railway embankment; and that where cattle went through the culvert into a field, and thence to a highway, and from the highway strayed to another part of the railway track where they were killed, the company was not liable to the owner, as it had not been guilty of any breach of duty under the Act of 1888, section 194, which only required the erection of fences for the purposes of keeping cattle off the railway track. Where, however, through defective fencing cattle got on to a highway, and thence to the track, the company was held liable: *Davidson v. Grand Trunk R.W. Co.*, 2 Can. Ry. Cas. 371.

In order to recover from the company under the Act of 1888 for a breach of duty to fence, it was not necessary to prove a legal title, providing the owner of the cattle could show that he was lawfully in possession and occupation of the premises, and, therefore, a locatee of lands in possession with the permission of the Crown Lands Department, but having no deed, was permitted to recover for cattle killed owing to insufficient fencing: *Davis v. Canadian Pacific R.W. Co.*, 12 A.R. 724; and a tenant, or a person whose cattle were allowed to pasture upon the lands of an adjoining owner with his leave and license, might recover, but an actual permission to do so must be shown: *Ferris v. Canadian Pacific R.W. Co.*, 9 Man. L.R. 501.

Effect of 52 Vict. cap. 28, sec. 2. This amendment was passed with the intention of enlarging the rights of owners of cattle which were running at large and which had strayed upon the property where they became trespassers, and the effect of it has been to permit the owners of cattle straying on to a property adjoining the railway, where they had no right to be, to recover for the defective fencing, wherever there was in the township or municipality a by-law permitting cattle to run at large. This

is the result of a recent decision of the Court of Appeal in *Fensom v. Canadian Pacific R.W. Co.*, 4 Can. Ry. Cas. 76, affirming the decision of Britton, J., and the Divisional Court, 2 Can. Ry. Cas. 376, 3 Can. Ry. Cas. 231, so that under this amendment the owner of cattle killed while trespassing on the property of a person adjoining a highway had only to prove that there was a by-law permitting cattle to run at large in the municipality and that they escaped owing to defective fencing, in order to recover from the railway company.

The cases decided under this sub-section may no longer apply because of the change made in the law by the Railway Act of 1903, but before dealing with this subject, it should be mentioned that under the amendment under consideration a by-law permitting cattle to run at large being in derogation of the common law, must be unequivocal, and if indefinite in its terms it cannot be construed as allowing cattle to stray on public roads or commons: *Duncan v. Canadian Pacific R.W. Co.*, 21 O.R. 355. As pointed out in the *Fensom Case*, such a by-law could not authorize the owner of cattle to permit them to stray upon the property of another; and in *McSloy v. Smith*, 26 O.R. 509, it has been held that the term "running at large" can only apply to cattle pasturing on highways. In England, where this amendment did not exist, it has been held that a railway is not liable for injury done to cattle pasturing on a highway, escaping thence on to the next property, from which they get on to the railway and are killed owing to the absence of railway fences: *Luscombe v. Great Western R.W. Co.* (1899), 2 Q.B. 313. As, however, there is no such provision in the new statute of 1903, the effect of by-laws permitting cattle to run at large would not now appear to have much bearing upon the present liability of railway companies.

Effect of the Act of 1903. It is to be observed that sub-section 3 of section 194, as amended by 53 Viet. cap. 28, sec. 2, does not now appear in the statute of 1903, and that no statutory liability for breach of the present provision respecting fencing is expressly imposed. Under section 237, sub-section 4, which is the equivalent of section 271 of the Act of 1888, we find that when "cattle or other animals at large upon the highway or otherwise get upon the property of the company, and are killed or injured by a train," the owner may recover. This, it is said, is substituted for 53 Viet., cap. 28, sec. 2 (D.), and the inference

would be that it was intended to provide a liability for failure to fence in accordance with the terms of section 199 of the new statute; but it will be seen that it has to do with a provision forbidding cattle to run at large on a highway, and does not seem to have anything to do with fencing. Therefore, unless there is some other provision in the statute providing that the owner can recover, it would appear that the railway company is not liable to the owner of cattle where they escape and are killed owing to defects in the fences.

Sections 200 and 201, *infra*, mention cases where an owner is *not* to have a right of action, but say nothing about cases where he should have a right to recover. Section 294 of the present Act provides that a company omitting to do anything required by the statute to be done on its part, shall be liable to any person injured thereby for the full amount of damages sustained; and under section 289, of 51 Vict. cap. 29, from which it has been taken in an amended form, it was held in *Curran v. Grand Trunk R.W. Co.*, 25 A.R. 407, that a special right of action became vested in anyone injured by reason of a breach of the provisions of the Railway Act. This section, read with the *Curran Case*, might apply to enable an owner to recover for breach of the duty to fence. He might also recover under such cases as *Billings v. Semmens*, 7 O.L.R. 340, 8 O.L.R. 540; *S. S. Marie Pulp Co. v. Meyers*, 33 S.C.R. 23, which decide that where there has been a breach of a statutory duty, and an individual has been thereby injured, he may recover damages in respect of any personal injury suffered by him. Of course, where cattle are killed while at large, section 237, sub-section 4 of this Act, provides an adequate remedy, and these remarks will not apply.

Injuries for which Railway Companies are Responsible. Under sub-section 3, section 194, of the Act of 1888, as amended by 53 Vict. cap. 28, sec. 2, it was provided that the company should be liable for all damages done by its trains or engines to cattle not wrongfully on the railway.

There has been some doubt whether the owner of cattle injured on a railway track can recover for other injuries than those due to the movement of trains, as where cattle are drowned at a point on the railway premises, or fall between the stringers of a bridge. In *James v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 409, Armour, C.J., appeared to think that there was an absolute duty to fence imposed upon the company, and that it

was liable for all the consequences flowing from the neglect of this duty. This view was not concurred in by Mr. Justice Osler in the same case, and from previous cases discussed in the notes upon the *James* decision, 1 Can. Ry. Cas. 438 and 439, it appears to be clear that the company is only liable for injuries done by its trains or engines, and is not liable for all injuries that may be suffered by cattle upon the track: see *Knight v. New York Central R.W. Co.*, 99 N.Y. 95; *International, etc., R.W. Co. v. Hughes*, 31 A. & E. Ry. Cas. 569. As already mentioned, no liability whatever is expressly imposed for breach of the company's duty to fence under the present statute, but under section 237, *infra*, the company is only liable for cattle killed by trains or engines, and section 200, *infra*, also refers only to cattle killed or injured by trains, so that it would appear that the law in this respect is not changed, provided that there is now any liability whatever for a failure to erect and maintain fences. Under the statute of 1888 and amendments, it was expressly decided in the Manitoba case of *McKellar v. Canadian Pacific R.W. Co.*, 3 Can. Ry. Cas. 322, that no damages could be recovered for injuries suffered by cattle through defects in fences, unless they were caused by the company's trains or engines.

Extent of Duty to Maintain Fences. The duty of a railway company to maintain its fences in a proper state of repair has been held to require a high order of vigilance. In *Studer v. Buffalo, etc., R.W. Co.*, 25 U.C.R. 160, it was laid down that the statute having required a railway in unqualified terms to maintain fences, this imposed a duty upon them to thoroughly inspect and repair defects; and the mere fact that a landowner knew of the defects and did not notify the railway company, was no excuse because the latter should, by its vigilance, have discovered and remedied them itself. See also *McMichael v. Grand Trunk R.W. Co.*, 12 O.R. 547, and *Dunsford v. Michigan Central R.W. Co.*, 20 A.R. 577. Under the amendment of 53 Vict. cap. 28, sec. 2, however, the liability was based upon an "omission" or "neglect" on the part of the company to maintain fences, so that apparently it became necessary for a plaintiff to prove not only the defect but also some negligence on the part of the company. As no liability is expressly imposed upon the company under the present Act for a failure to maintain fences, its liability, if any, would still appear to depend upon some "omission" or "neglect" on its part in the terms of section 294 of the present

Act, and therefore, if it could be shown that the cattle had escaped before the company had an opportunity of knowing of the defect and repairing it, it could not be guilty of negligence. This point yet remains to be decided. Even under the former statute it has been stated that the fact of an accident occurring is not of itself evidence of negligence, but affirmative evidence proving the neglect must be given; and if the fact of negligence is left doubtful, the defendants are entitled to the verdict: *Falconer v. European North American R.W. Co.*, 1 Pug. (N.B.) 179; *Lambert v. Grand Trunk R.W. Co.*, 28 L.C.J. 3; and where fences have been accidentally destroyed by fire after the track expert has made his daily inspection, and the fact is not known until after the injury is done, the company is not guilty of negligence: *Toledo, etc., R.W. Co. v. Elder*, 45 Mich. 329; *Abbott Ry. Law*, 403.

Character and Condition of Fences. Under the Act of 1888 the railway company was required to maintain fences of the height and strength of an ordinary division fence. This is now altered, and the height of the fence must be 4 feet 6 inches at the least. The mere fact that a fence is made of barbed wire and that cattle have been injured by running against it, does not show that the fence is a nuisance or that it is dangerous, and the company is not necessarily liable for using that material: *Hillyard v. Grand Trunk R.W. Co.*, 8 O.R. 583; *Plath v. Grand Forks, etc., R.W. Co.*, 3 Can. Ry. Cas. 331; see also *McKellar v. Canadian Pacific R.W. Co.*, 3 Can. Ry. Cas. 322. If an opening is left in a fence of sufficient size to enable an animal to pass through, even when such opening is at a place where there is a ditch for draining the land, the railway company is liable: *Huot v. Quebec, etc., R.W. Co.*, 2 Can. Ry. Cas. 367; and so if a fence is so low that a horse in a state of fright could jump over it, the fence has been held to be insufficient and the company has been held to be liable: *Landry v. North Shore R.W. Co.*, 9 L.N. 5.

When a Railway is not Liable for Defective Fencing. In addition to the cases already mentioned of cattle escaping through a defective fence or trespassing on an adjoining owner's land, it has been held that a railway company is not liable to a landowner where the fence has been taken down at his request, or has been built in a particular manner which he accepts as satisfactory: *Clayton v. Great Western R.W. Co.*, 23 U.C.C.P. 137; *Kilmer v. Great Western R.W. Co.*, 35 U.C.R. 595;

Ellis v. London, etc., R.W. Co., 2 H. & N. 424, and this is equally the case where the cattle of a tenant or a subsequent purchaser have been killed or injured owing to defects consented to by the landlord or previous owner. The decision in *Quebec Central R.W. Co. v. Pellerin*, Q.R. 12 K.B. 152, appears to be at variance with these cases.

A question was raised under the Government Railway Act whether boundary ditches might be a sufficient fence: *Morin v. The Queen*, 2 Ex. C.R. 390, see 20 S.C.R. 515; but it is to be observed that a boundary ditch does not comply with the terms of the present section. Under similar American legislation, it has been held that a railway company is not compelled to fence station grounds: Elliott on Railways, page 1834; *McGrath v. Detroit*, 22 Am & Eng. Ry. Cas. 574; *Cornell v. Manistee*, 11 Am. & Eng. Ry. Cas. N.S. 263. But in Scotland it has been held that the railway company is liable for a failure to fence a siding whereby a child gets upon the track and is killed: *Innis v. Fife Coal Co.*, 3 F. (Sess.) 335. As already mentioned, a railway company is only bound to fence its track, and is not liable for cattle passing through a culvert and being injured by reaching the railway track, otherwise than through a defect in the fencing at a point where they are pasturing: *Grand Trunk R.W. Co. v. James*, 1 Can Ry. Cas. 422.

Duty to Maintain Gates. Prior to the Act of 1888, a railway company was not compelled to furnish an owner with farm crossings or to provide gates: *Ontario, etc., R.W. Co. v. Canada Southern R.W. Co.*, 1 Can. Ry. Cas. 17, and see other cases cited under section 198. Where, however, gates are provided the company's duty to maintain them is co-extensive with its liability in respect of fences: *McMichael v. Grand Trunk R.W. Co.*, 12 O.R. 547. The mere fact that a landowner knows of a defect in the gates and does not notify the company, will not absolve it from liability: *Dunsford v. Michigan Central R.W. Co.*, 20 A.R. 577; but where an owner opens up a road through his land and puts up a gate opening on the road, which was left open by people passing through, the company was not liable: *Jasmin v. Ontario and Quebec R.W. Co.*, 6 L.N. 163. Sections 200 and 201 also provide that the owner shall not recover where he fails to keep the gates closed when not in use; and section 291, sub-section 2, provides a penalty for persons who wilfully destroy gates, fences and other erections belonging to the company.

Onus of Proof. The plaintiff must show that his cattle have been killed by the company's trains or engines, but where it was proved that his cattle were in his yard at nine o'clock one evening, and were found lying wounded alongside the railway track at ten o'clock the following morning, it was held that it might be fairly inferred that the injury was caused by one of the defendant's trains: *MacMillan v. Manitoba, etc., R.W. Co.*, 4 Man. L.R. 220; and where passengers on the train saw the conductor and others employed on the train, examining a horse lying at the foot of an embankment near a railway, unable to rise without assistance, and early next morning the plaintiff's horse was found dead near the same place with several ribs broken, this was held sufficient evidence for a jury that the animal had been killed by a train on the previous night: *New Brunswick R.W. Co. v. Armstrong*, 23 N.B.R. 193; and where a horse was found dead near the defendant's tracks, and it did not appear how it had been killed, but the fence adjoining the track was in good condition, and the gate leading to it was frequently left open by persons passing through, the defendants were not liable: *Lambert v. Grand Trunk R.W. Co.*, 28 L.C.J. 3. If there is evidence to show that the stock killed had entered on the track at a place where the fence was generally insecure it is not necessary to show that the particular point through which the animal passed was itself insecure: *Louisville, etc., R.W. Co. v. Spain*, 61 Ind. 460, Abbott on Railway Law 403.

Condition of Cattle Guards. Prior to 20 Vict., cap. 12, sec. 16, it had been held that a railway was liable for cattle going on the track through defective cattle guards, even though they were straying on the highway at the time: *Huist v. Buffalo, etc., R.W. Co.*, 16 U.C.R. 299, and in a County Court case in Manitoba this rule was adopted even after the passing of that statute where it was shown that the cattle got on the track owing to the cattle guards being filled up with snow: *Phillips v. Canadian Pacific R.W. Co.*, 1 Man. L.R. 110, and a similar rule was laid down sometimes in Quebec even after the passing of the statute in question: *Pontiac Pacific R.W. Co. v. Brady*, Montreal L.R. 4 Q.B. 346; *Cross v. Canadian Pacific R.W. Co.*, Q.R. 2, S.C. 365; but the law in Quebec appears to be now settled in conformity with the present law in Ontario as afterwards outlined in this note: *Cross v. Canadian Pacific R.W. Co.*, Q.R. 3 Q.B. 170; *Campbell v. Grand Trunk R.W. Co.*, Q.R. 3 Q.B. 570;

Abbott on Railways, 406. 20 Victoria, cap. 12, sec. 16, which became section 271 of the Act of 1888 made a marked change in the law and prevented the owners of cattle straying upon the highway from recovering in all cases in which they failed to show that the cattle were "in charge" within the meaning of that section: *Thompson v. Grand Trunk R.W. Co.*, 18 U.C.R. 92; *McGee v. Great Western R.W. Co.*, 23 U.C.R. 293; *Markham v. Great Western R.W. Co.*, 25 U.C.R. 576. The law has again been changed by section 237 of the present Act, and the effect of this section read with the one now under consideration may be to enable owners of cattle passing upon a highway in charge of some person to recover, notwithstanding the decisions mentioned under that section. This subject is more fully dealt with in the notes to section 237, *infra*.

When Fences Must be Erected. Under sub-section 4, *supra*, a railway company is not compelled to erect fences unless the lands are improved or settled and enclosed and unless the Board otherwise orders. In *New Brunswick R.W. Co. v. Armstrong*, 23 N.B.R. 193, it was held under a similar section that the defendants are bound to show that the land from which the stock escaped was not improved if they desired to be relieved from the necessity of erecting fences.

Effect of Provincial Legislation. A railway company within the jurisdiction of the Parliament of Canada is not bound to comply with Provincial Legislation requiring the erection of fences: *Madden v. Nelson, etc., R.W. Co.*, 5 B.C.R. 541, (1899) A.C. 626; see also *Grand Trunk R.W. Co. v. Therrien*, 30 S.C.R. 485.

Cattle Trespassing. The primary duty of the engineer being to manage his train so as to best insure its safety the company is not liable where horses are killed while trespassing on the track if the engineer could not stop his train or if he thought that the horses would get off safely without his doing so, or if in the exercise of reasonable discretion he considered that the safety of the train demanded the putting on of steam rather than slowing up and running the risk of being derailed: *Auger v. Ontario, etc., R.W. Co.*, 9 U.C.C.P. 164; *Connors v. Great Western R.W. Co.*, 13 U.C.R. 401; *Campbell v. Great Western R.W. Co.*, 15 U.C.R. 498; *Hurd v. Grand Trunk R.W. Co.*, 15 A.R. 58; *Falconer v. European, etc., R.W. Co.*, 14 N.B.R. 179; *McFie v. Canadian Pacific R.W. Co.*, 2 Man. L.R. 6; and no

duty is cast upon them to wait until the cattle have been entirely driven off their premises, but if they recklessly or wilfully kill or injure cattle when this could with reasonable care and complete safety have been avoided, the above cases show that the company will be liable even though the cattle are wrongfully on the track.

Mode of Enforcing the Erection of Fences. In *Masson v. Grand Junction R.W. Co.*, 26 Gr. 286, an injunction was granted restraining the company from using its railway until fences had been erected, but on appeal this was reversed on the ground that the possible injury to the defendants by the stoppage of their work largely outweighed any advantage to the plaintiff, and that the proper ruling was in the nature of mandamus or mandatory injunction requiring the company to erect fences. *Ib.* 289, note.

200. The persons for whose use farm crossings are furnished shall keep the gates at each side of the railway closed when not in use; and no person, any of whose cattle are killed or injured by any train, owing to the non-observance of this section, shall have any right of action against any company in respect to the same being so killed or injured. 51 V., c. 29, s. 198.

As pointed out above, this section prevents an owner from recovering where he fails to keep his gates closed. It furnishes an argument that an owner can recover if the gates are open owing to some negligence on the part of the railway company.

201. Every person who wilfully leaves any such gate open without some person being at or near it to prevent animals from passing through it on to the railway, or who takes down any part of a railway fence, or turns any horse, cattle or other animals, upon or within the inclosure of such railway, except for the purpose of, and while, taking the same across the railway in the manner provided by section 198 of this Act, or who without the consent of the company, or except as authorized by this Act, rides, leads or drives any horse or other animal, or suffers any such horse or animal to enter, upon such railway and within the fences and guards, is liable, on summary

Land owners must close gates at farm crossings.

Leaving gates open.

Taking down fences.

Putting cattle on railways.

Permitting animals to get on railways.

Penalties for so doing. conviction, to a penalty of twenty dollars for each offence, and is also liable to the railway company for any damage to the property of the company or for which the company may be responsible by reason of such gate being so left open, or by reason of such fence being so taken down, or by the turning, riding, leading, driving or suffering to enter, upon or within the inclosure of such railway in violation of this section of any horse, cattle or other animal: and no person, any of whose cattle are killed or injured by any train owing to the non-observance of this section shall have any right of action against any company in respect to the same being so killed or injured. Every person violating the provisions of this section shall in addition to the penalty herein provided be liable to pay any person injured by reason of such violation all damages sustained thereby. 51 V., c. 29, ss. 199 and 272, Am.

No recourse against company.

Additional damages.

This section appears to be an amplification of section 200, and it should be read in conjunction with section 291, sub-section 2, *infra*, providing for penalties for weakening or destroying any gate or fences. For cases applicable to this section see notes to section 199, *supra*.

Bridges, Tunnels and other Structures.

Headway respecting bridges and tunnels. 202. Every bridge, tunnel or other erection or structure, over, through or under which any railway, now or hereafter, passes, shall be so constructed, and, if need be, be re-constructed or altered within such time as the Board may order, and shall thereafter be so maintained, as to afford, at all times, an open and clear headway of at least seven feet between the top of the highest freight car used on the railway and the lowest beams, members, or portions of that part of such bridge, tunnel, erection or structure, which is directly over the space liable to be traversed by such car in passing thereunder; but in no case shall the space between the rail-level and such beams, members or portions of any such structure, hereafter constructed, be less than twenty-two feet six inches, unless by leave of the Board.

2. If, in any case, it is necessary to raise, reconstruct or alter any bridge, tunnel, erection or structure not owned by the company, the Board, upon application of the company and upon notice to all parties interested, or without any application, may make such order, allowing or requiring such raising, reconstruction or alteration, upon such terms and conditions as to the Board shall appear just and proper and in the public interest.

Powers of Board where owners refuse to permit compliance.

3. The Board may exempt from the operation of this section any bridge, tunnel, erection or structure, over, through or under which no trains are run, except such as are equipped with air brakes.

Board may exempt certain bridges, etc.

4. Every company or owner shall incur a penalty not exceeding fifty dollars for each day of wilful neglect, omission or refusal to obey the provisions of this section. 51 V., c. 29, s. 192, Am.

Penalty.

This section should be read in connection with sections 188, 189 and 190, *ante*, and the notes thereto. In addition to the provisions appearing in section 192 of the Act of 1888 of which the above section 202 is a consolidation and amendment, there had been passed 62 and 63 Vict., cap. 37, sec. 3, dealing with companies having power under their Special Act to construct and maintain and use a bridge for railway purposes. This Act has been repealed by section 310, *infra*, and no equivalent clause appears in the present consolidation.

Clear Headway. Where a highway bridge over a leased line is not of the required headway a company operating and leasing the railway is not liable to a person injured on account of the defect in the height of a bridge: *McLauchlin v. Grand Trunk R.W. Co.*, 12 O.R. 418. Nor is a company having running rights over another railway liable for an accident which happened owing to the failure of the company owning the bridge to raise it as required by the statute: *Gibson v. Midland R.W. Co.*, 2 O.R. 658. But where a company is using a car on its railway which is higher than its own and does not therefore leave sufficient headway it may be liable for the death of a brakeman killed on that account: *Atcheson v. Grand Trunk*

R.W. Co., 1 Can. Ry. Cases 490. But if after a company has built a bridge of sufficient legal height over a highway that height is diminished owing to the failure of the municipality to keep the roadway at its former level, the railway company is not liable: *Carson v. Weston*, 1 Can Ry. Cas. 487, and a company has no right to raise a municipal bridge passing over a railway without obtaining the consent of the municipality or the owner of the bridge, and if they do so they are liable to the adjoining proprietor for any damages sustained by reason of the increased height of the highway as it approaches the bridge: *Hill v. Grand Trunk R.W. Co.*, 12 L.N. 57.

Maintenance of Bridges. A railway company is bound to keep in repair and to maintain fences upon any bridge which they erect in accordance with the duty imposed upon them by statute: *VanAllen v. Grand Trunk R.W. Co.*, 29 U.C.R. 436.

As to whether they are required to maintain and repair approaches to such a bridge see notes to section 188, 189 and 190, *supra*. A railway company is liable for all damages suffered on account of the non-repair of a bridge which it is required to maintain: *Zimmer v. Grand Trunk R.W. Co.*, 21 O.R. 628, 19 A.R. 693, and they are bound to provide against all dangers to a bridge that could reasonably have been foreseen, and if a bridge were so constructed that it could be destroyed by a storm such as might reasonably have been anticipated the railway company is liable: *Carney v. Caraquet R.W. Co.*, 29 N.B.R. 425. But if a bridge is destroyed by some force of nature that could not have been foreseen the company would not be liable: *Ibid*.

Width of Bridge. A company connected a roadway 66 feet wide across part of their track with a bridge 40 feet 2 inches wide, and it was held that a jury might properly find that this was a sufficient compliance with the Act and that the company had not necessarily committed a nuisance: *Regina v. Great Western R.W. Co.*, 12 U.C.R. 450.

Bridge over Navigable Waters. Unless an individual can show that he has sustained some injury peculiar to himself he cannot recover damages for an obstruction to navigation owing to a bridge being improperly built. The proper remedy for such an obstruction is by indictment: *Small v. Grand Trunk R.W. Co.*, 15 U.C.R. 283; *Cull v. Grand Trunk R.W. Co.*, 10 Gr. 491. Where a company has impeded navigation it is no

defence to say that they impeded it as little as possible and for only a short time: *Snure v. Great Western R.W. Co.*, 13 U.C.R. 376. Where a company controlling a swing bridge over a canal was not able to open it as plaintiff's vessel was approaching, although notice was given of its approach by blowing a horn and hailing, the company was held not liable for injuries received by the vessel: *Turner v. Great Western R.W. Co.*, 6 U.C.C.R. 536.

Bridges over Highways. Where a company in crossing a highway had to make a cutting in a road to be afterwards supplemented by a bridge which could not be erected until the cutting was completed it was held that as it had carried on the work diligently and that as before the trial the bridge had been completed the plaintiff, a private individual, could not recover because the defendants had not under the circumstances been guilty of any wrong, and the delay, even if improper, should have been the subject of an indictment, and not of a private action: *Ward v. Great Western R.W. Co.*, 13 U.C.R. 315. But where a railway company neglected to make a proper bridge over the railway where it crossed a highway owned by a Toll Road Company, the latter were permitted to recover for this neglect: *Streetsville Plank Road Co. v. Hamilton, etc., R.W. Co.*, 13 U.C.R. 600. Where a company erected a bridge over a highway thereby partially destroying and obstructing the plaintiff's access to it, but leaving him room to reach it at one end of the bridge it was held that there was no right of action for the defendants' charter bound them to do the act complained of and made no provision for compensation: *MacDonnell v. Ontario, etc., R.W. Co.*, 11 U.C.R. 271.

203. With respect to all bridges, tunnels, viaducts, trestles, Bridges, or other structures, through, over, or under which the com-^{etc., over}pany's trains are to pass, the span, or proposed span or spans,^{18 feet} long. or length of which exceeds eighteen feet, the company shall not commence the construction or reconstruction, of, or any material alteration in, any such bridge, tunnel, viaduct, trestle, or other structure, until leave therefor has been obtained from the Board, unless such construction, reconstruction, or alteration is made in accordance with standard specifications and plans approved of by the Board.

Proceed-
ings
before
construc-
tion.

2. Upon any application to the Board for such leave, the company shall submit to the Board the detail plans, profiles, drawings and specifications of any such work proposed to be constructed, and such other plans, profiles, drawings and specifications as the Board may in any case, or by regulation, require, and the provisions of paragraphs 5, 6, and 7 of section one hundred and eighty-two, respecting the construction of works in navigable waters, and the powers of the Board relating thereto, shall apply to any and all works constructed or to be constructed under this section.

This section requires that all plans for bridges over eighteen feet long shall be submitted to the Board of Railway Commissioners. The rules drawn up by the Board in October, 1904, on this subject, will be found as an appendix to this work.

Stations.

Stations
to be
suitable.

204. Every station of the company shall be erected, operated, and maintained with good and sufficient accommodation and facilities for traffic.

Location
to be
approved
by Board.

2. Before the company proceeds to erect any station upon its railway, the location of such station shall be approved of by the Board.

Stations
on rail-
ways sub-
sidized
by
Parlia-
ment.

3. In the case of any railway, whether subject to the legislative authority of the Parliament of Canada or not, subsidized after the eighteenth day of July, in the year one thousand nine hundred, in money or in land, under the authority of an Act of the Parliament of Canada, the payment and acceptance of such subsidy shall be taken to be subject to the covenant or condition, (whether expressed or not in any agreement relating to such subsidy), that the company, for the time being owning or operating such railway, shall, when thereto directed by order of the Board, maintain and operate a station, with such accommodation or facilities in connection therewith, as

are defined by the Board, at such point or points on the railway as are designated in such order. 63-64 V., c. 23, ss. 10 and 11, Am.

Previous Legislation. Sub-sections 2 and 3 of this section were introduced originally into the Railway Act in 1900, by 63 and 64 Vict., cap. 23. Sub-section 1 did not in terms appear in the previous Act.

It was expressly provided in section 10 of the amendment of 1900 that it should only operate in regard to any station erected on a railway the construction of which is authorized by an Act of the Parliament of Canada passed subsequent to June 1st, 1899, but it will be seen that the application of section 204 is not in terms limited to railways created after that date.

Other Provisions of this Act Affecting Stations. The power to build stations is conferred upon railways by section 118, sub-section (g), *ante*.

By section 137 the Board may authorize one company to use the tracks, stations or station grounds of another company subject to the provisions of that section.

By section 138, *ante*, it is provided that the lands for stations, depots and yards, etc., shall not exceed one mile in length by 500 feet in breadth, including the right of way. But by section 139, should the company require more space, the Board may upon the terms therein mentioned authorize the company to expropriate additional lands.

Section 214, *infra*, also deals with the character of the accommodation which companies must furnish at their stations. The term "traffic" in sub-section 1 of the above section, as defined by section 2 (z), *ante*, means and includes passengers, goods, and rolling stock.

English Legislation. By 8 Vict., cap. 20, sec. 45, (Imp.), companies in England may obtain additional lands for stations and by 17 & 18 Vict., cap. 31, sec. 2, railway companies are required to furnish reasonable facilities to persons requiring to use their stations.

Stations Defined. For assessment purposes in England it has been held that a station should include all sidings attached thereto for whatever purpose: *London, etc., R.W. Co. v. Wigan* 2 N. & Mac. 240, but this case has been doubted: *Great Eastern R.W. Co. v. Fletton*, Browne on Rating, Second Edition, 631.

Platforms and the roof covering the railway and the sidings may be rated as land used only as a railway, as distinguished from a station proper: *London, etc., R.W. Co. v. Llandudno*, (1897), 1 Q.B. 287.

Public Control over Stations. Subject to the provisions of this section and section 214, *infra*, a station is the private property of the company and they may admit or exclude anyone they see fit: *Barber v. Midland R.W. Co.*, 18 C.B. 46, although a passenger or an intending passenger about to obtain a ticket is entitled of course to access to it and to the use of it. Railways are not bound to allow hotel runners upon their premises and may exclude them if they see fit: *Perth v. Ross* (1897), A.C. 479, and a cab-man after he has completed his work may be required to leave and if he refuses he may be treated as a trespasser and removed by force if necessary: *Wood v. North British R.W. Co.*, 2 F. (Ct. Sess., 5 Ser.) 1. Though a person may be arrested as a trespasser at a station platform at common law, he could not be prosecuted under the English Regulation of Railway Act of 1868, section 23, for trespassing upon the railway, because the platform cannot for that purpose be treated as part of the railway. (Compare section 291, *infra*): *Thompson v. Great North of Scotland R.W. Co.*, 2 F. (Just. Cas.) 23. A company may give a cab-owner the exclusive right of plying for hire at their stations where the arrangement is for the benefit of the public: *Reid v. Beadell*, 2 C.B. N.S. 509; *Painter v. London, etc., R.W. Co.*, *ibid.*, 702; *Ilfracombe v. London, etc., R.W. Co.*, 1 N. & Mac. 61, and the owner of an omnibus company cannot claim admission to a station or station grounds as of right: *Barker v. Midland R.W. Co.*, 18 C.B. 46; but a railway company will not be allowed to admit the omnibus of one proprietor to the exclusion of an omnibus belonging to another proprietor where such a monopoly would be inconvenient to the public: *Mariott v. London, etc., R.W. Co.*, 1 C.B.N.S. 499. Where a railway company refuses to carry coal from a certain station unless raised upon a certain estate, the Railway Commissioners held that the company was giving undue preference to other stations and had withheld reasonable facilities, and compelled them to accept coal obtained from other estates at that station: *Rishton v. London, etc., R.W. Co.*, 8 Ry. and Canal Traffic Cas. 74; but where a company closes a station for passenger traffic although a substantial

amount of such traffic was offered, it was held under the English Act that they had a right to do so; one of the Judges thinking that they were not obliged to keep a station open if they were required to do business at a loss: *Darlaston v. London, etc., R.W. Co.* (1894), 2 Q.B. 694. A railway company may properly charge for the use of a water-closet at their stations: *West Ham v. Great Western R.W. Co.*, 64 L.J.Q.B. 340, and they may not only charge for cloak room privileges, but may hold goods deposited by the bailee until the bailee or the true owner pays such charges: *Singer v. London, etc., R.W. Co.* (1894), 1 Q.B. 833. Where two railways are entitled to the joint use of a station and fail to be able to agree upon such user the court will interfere by directing the appointment of a receiver and by prescribing regulations for the management of a station, but such interference ought not to take place without grave occasion and until all the provisions, if any, for settling disputes between the companies have been exhausted: *Shrewsbury, etc., R.W. Co. v. Stour Valley R.W. Co.*, 2 D.M. & G. 866.

In London under the London Hackney Act it has been held that a station is not such a public "street or place" that a cab-man waiting for travellers is obliged to carry anyone else who offers himself for transport: *Case v. Storey*, L.R. 4 Ex. 319; but a cab-man standing on the station grounds is liable to the ordinary municipal provisions requiring him to obtain a license and pay a fee: *Clark v. Stanford*, L.R. 6 Q.B. 357; *Allen v. Tunbridge*, L.R. 6 C.P. 481; see *Skinner v. Ulster*, L.R. 7 Q.B. 423; but a cab-man must drive a traveller into the station grounds, not merely depositing him on the street if his passenger so requires it, and the railway company permits: *Ex parte Kippins* (1897), 1 Q.B. 1. As although passenger stations are intended only for intending passengers or travellers and persons getting off trains, the company usually permits the friends of the passengers to accompany them to the station, they are entitled to greater rights than a bare licensee, and being there on the company's implied invitation, the company owes them the same duty as to passengers: *Watkins v. Great Western R.W. Co.*, 37 L.T.N.S. 193; but a person posting a letter upon a train is a bare licensee and the company is not liable for an accident happening to him due to the condition of the premises unless there is some concealed defect amounting to a trap: *Spence v. Grand Trunk R.W. Co.*, 27 O.R. 303. Although a company must

keep the approaches to its station in good condition, it cannot be compelled to rebuild a bridge in order to accommodate an increased traffic if the bridge already built has been dedicated to the public and become a portion of the adjoining highway, and has therefore passed out of the control of the company: *Arbroath v. Caledonia R.W. Co.*, 10 Ry. & Can. Traffic Cas., 252. In England a company is liable for an injury to a passenger falling upon a piece of ice extending across the platform: *Sheppard v. Midland R.W. Co.*, 25 L.T.N.S. 879. But where an accident happens from something which has for a long time been used with safety as where a person stumbles against a weighing machine in the usual place and there is no other evidence of negligence the company is not liable: *Cornman v. Eastern Counties R.W. Co.*, 4 H. & N. 781. But where a box containing signal levers projects about two inches above a platform and an injury results the company has been held to be liable: *Sturgess v. Great Western R.W. Co.*, 56 J.P. 278. Where timber becoming loose injures a passenger in a passenger train there is no evidence of negligence, if the mode of fastening the timber has been in accordance with the usual custom: *Hanson v. Lancashire, etc., R.W. Co.*, 20 W.R. 279, and where a person in search of the urinal lighted by a lamp falls through an open door and down some steps he has no right of action: *Toomey v. London, etc., R.W. Co.*, 3 C.B.N.S. 146; nor is a company liable for injuries done by a dog which happens to get into the station: *Smith v. Eastern R.W. Co.*, L.R. 2 C.P. 4. As already mentioned a company must provide reasonable means of access to and from their stations: *John v. Bacon*, L.R. 5 C.P. 437, and if a bridge over which passengers usually pass is not reasonably safe the company is liable to any one injured: *Longmore v. Great Western R.W. Co.*, 19 C.B.N.S. 183; but the mere fact of an opinion being given by witnesses that a bridge is dangerous is not evidence of negligence: *Rigg v. Manchester, etc., R.W. Co.*, 12 Jur. N.S. 525. And a bridge is only required to be safe for persons using it in the ordinary way, and a company is not liable for an accident to a child that walks over it sideways and does not look where it is going: *Lay v. Midland R.W. Co.*, 35 L.T.N.S. 529; also a person who falls down a properly constructed stairs leading from a station cannot sue on the ground that less slippery material might have been used: *Crafter v. Metropolitan R.W. Co.*, L.R., 1 C.P. 300.

Where a passenger having only two minutes to catch a train in running falls over a switch handle in his path on the station platform and was hurt the company was held liable: *Martin v. Great Northern R.W. Co.*, 16 C.B. 179; but if he takes an indirect and unusual road to a station not intended for a foot way where there is a direct road, well lighted and safe, he cannot recover for injuries received: *Walker v. Great Western R.W. Co.*, 8 U.C.C.P. 161; and so where a person leaves a safe for a dangerous path and is killed his widow could not recover: *Jones v. Grand Trunk R.W. Co.*, 16 A.R., 17, 18 S.C.R. 696; but where a company leaves a dangerous spot uncovered at an exit from a station, which is frequently used a person injured was held entitled to recover: *Oldright v. Grand Trunk R.W. Co.*, 22 A.R. 286.

Passengers Alighting from or Boarding Trains. Where a train is too long to enable all the cars to draw up at a platform and where a person getting out alights at a point where the step of the car was three feet from the ground a verdict in favour of a female passenger who was injured was sustained: *Foy v. London, etc., R.W. Co.*, 18 C.B.N.S. 225; and the same result was reached where a train overshot a platform and the passengers were not warned to keep their seats, nor was the train backed up to the platform: *Siner v. Great Western R.W. Co.*, L.R. 3 Ex. 150, 4 Ex. 117. These cases were of course decided in England where there is no means of communication from one car to another, see also, *Cockle v. London, etc., R.W. Co.*, L.R. 5 C.P. 457, 7 C.P. 321; *Bridges v. North London R.W. Co.*, L.R. 5 C.P. 459, 6 Q.B. 377, and 7 H.L. 213. Where on passing through a station its name is called out and a train stopped beyond a platform, but immediately afterwards was backed opposite to it, it was held that there was no evidence of negligence in this conduct, and that the calling out of the name of a station was hardly an intimation to passengers that the station at which they were about to stop was that particular station: *Lewis v. London, etc., R.W. Co.*, L.R. 9 Q.B. 66; but where on approaching a station the plaintiff heard its name called out, the train stopped, and the carriage doors were opened and shut and a person near him was seen to alight, and there was no light, no warning and no intimation that the stoppage was only temporary it was held that he was entitled to recover for injuries received owing to the train having over-shot the plat-

form whereby the plaintiff fell and was hurt: *Weller v. London, etc., R.W. Co.*, L.R. 9 C.P. 126, and see *Rose v. Northern R.W. Co.*, L.R. 2 Ex. D. 248; *Robson v. Northern R.W. Co.*, L.R. 10, Q.B. 271, 2 Q.B.D. 85. Where the plaintiff was being carried on a train on which she had never been carried before, though she knew the station very well, and the train was too long for the platform on account of which she fell and was hurt, and though she admitted that she did not look on stepping down, there being evidence of an implied invitation to alight, she was held entitled to recover and was not precluded on account of contributory negligence: *Glasscock v. London, etc., R.W. Co.*, 18 T.L.R. 295. In *Hall v. McFadden*, 19 N.B.R. 340, 21 N.B.R. 586, Cassels' Supreme Court Digest 723, a passenger was waiting on a station platform until the time for starting had arrived, and while he was boarding the train, the conductor who was on the opposite platform could not see the passengers who were getting on from the station gave the signal to start, and the motion of the train threw the plaintiff down and he was injured; the conductor had previously called "all aboard." The Supreme Court held that there was evidence of negligence on the part of the company, and that after calling "all aboard" it is the conductor's duty to wait a reasonable time for passengers to get on before signalling to start, see also *MacDonald v. St. John*, 25 N.B.R. 318. Where a plaintiff in Manitoba was alighting in the dark at a small station having no platform and no lights and hurt her knee (which had been previously weak) in stepping down, the brakeman assisting her and having his lantern at the spot, it was held that the defendants were not guilty of negligence: *McGinney v. Canadian Pacific R.W. Co.*, 7 Man. L.R. 151.

In *Quebec Central R.W. Co. v. Lortie*, 22 S.C.R. 326, the train was longer than the platform, and the car in which Lortie was travelling was not opposite the platform when brought to a standstill. Lortie fearing that his car would not be brought up to the station and that the train was about to move on, jumped to the ground with his portmanteau and alighted on a round stone and was hurt. It was held that there was nothing in these circumstances amounting to negligence on the part of the company.

In *Holland v. Canadian Pacific R.W. Co.*, 33 N.B.R. 78, the plaintiff and others were at a flag station on a dark night. The

engine driver did not see their signal and failed to stop until he had passed the station. While preparing to back down to it, some unknown person from the train platform shouted "come on" and the plaintiff in obeying the summons fell into a culvert and was injured and it was held that there was no evidence of negligence. Where the plaintiff was travelling on a ticket good to a certain station, but for her own convenience was carried to a place a short distance beyond, to where a platform had been erected by a private person for his own purpose but with the company's consent, it was held that she could not recover for the injuries suffered in walking along the platform owing to some alleged defect in it: *Burke v. British Columbia, etc., R.W. Co.*, 7 B.C.R. 85. In *Giles v. Great Western R.W. Co.*, 36 U.C.R. 360, a passenger who was slightly intoxicated was found dead a little beyond the station at which he was to alight and the evidence as to whether the train stopped at the station long enough to enable passengers to get off was contradictory, but there was nothing to show how the deceased met his death, Held that there was no evidence of negligence for a jury; but see *Delahanty v. Michigan Central R.W. Co.*, 3 Can. Ry. Cas. 311. In that case a drunken passenger was put off at a small station near the Niagara River without being given into the charge of anyone, and he afterwards strayed after the train on which his luggage remained, and fell over a bridge and was drowned, and it was held that the defendants were liable as the act of deceased was what might reasonably have been expected from a man in his condition. In *Haldan v. Great Western R.W. Co.*, 30 U.C.C.P. 89, an intending passenger, who was a little late, tried to board a moving train and struck against an obstacle on the platform and was hurt. It was held that he could not recover. Where, after calling out the name of the next station, a train was slowed up on approaching and passing it, but was not fully stopped, it was held that there was evidence of an invitation to alight, and of negligence in not stopping, and that the plaintiff, who had tried to alight and was injured, could recover: *Edgar v. Northern R.W. Co.*, 4 O.R. 201; 11 A.R. 452. Where an attempt to board a moving train, even at the conductor's invitation, entails a patent and obvious risk, it may be that the plaintiff would not be entitled to recover: *Curry v. Canadian Pacific R.W. Co.*, 17 O.R. 65; but the mere fact of a passenger getting off a moving train is not necessarily negli-

gence. In every case it is a question for the jury whether the passenger acted reasonably under the circumstances, and where a train scheduled to stop at a station did not stop long enough to enable passengers to get off, and a passenger attempting to alight after the train had started again, was thereby injured, he was held entitled to recover: *Keith v. Ottawa, etc., R.W. Co.*, 2 Can. Ry. Cas. 23 and 27. The general subject of alighting from and boarding moving trains at stations has been dealt with at length in 2 Can. Ry. Cas., pp. 37 to 46.

Covenants Respecting Stations and Other Works. The questions arising in cases of this kind are as numerous as the cases themselves, for each case depends more or less on its own circumstances, and other decisions are useful more for illustration than for the principles they lay down. Railways, when taking over other lines, or negotiating for bonuses or franchises with municipalities, or certain benefits from the individual owners of land, frequently enter into undertakings and make promises which their subsequent policy or a change in the surrounding circumstances renders it inexpedient that it should be forever adhered to. The question then arises (1) whether the covenant was *ultra vires* of the railway or the other contracting party; (2) what constitutes a fulfilment of it; (3) whether the covenant is perpetual or temporary; (4) whether it was waived or annulled by subsequent legislation; (5) whether a mandamus, injunction, specific performance or damages is the proper remedy.

The interests of the public require that a railway should be maintained in the highest state of efficiency without being hampered by conditions which a change in the circumstances of a locality may have rendered detrimental, and this has led to a somewhat strict interpretation of contracts by railway companies to do certain specified acts or to maintain their line forever in a certain condition or position, particularly where these contracts may interfere with the railway premises, and consequently with the efficient operation of the line itself. As a rough working principle, the following may be quoted from Pierce on Railroads, page 62: "The construction of written conditions should be reasonable and such as will facilitate the objects of the enterprise and should have regard to a substantial compliance with the agreement rather than to a severely literal execution of its terms:" see *People v. Holden*, 82 Ill. 93.

Nevertheless, where an agreement by a railroad to do a certain work is explicit, an injunction will be granted restraining the railway from operating until it performs a condition precedent to its operation, which it has agreed to, for the inconvenience to the public by stopping the railway altogether until the conditions are performed is no defence to an action on an acknowledged breach of the agreement: *Raphael v. Thames Valley R.W. Co.*, 2 Ch. App. 147; the same principle is laid down by a divided Court in *Lloyd v. London, Chatham, and Dover R.W. Co.*, 2 D.J. & S. 569. Sometimes in the United States agreements requiring a particular location for a station, especially if excluding any other site for one, have been held to be contrary to public policy and not binding on the parties on the ground that they conflict with public interests: *Fuller v. Dame*, 18 Pick. 472; *Williamson v. Chicago, etc., R.W. Co.*, 1 Albany L.J. 29; Pierce on Railroads, pp. 60 and 513; and in New York subscriptions to stock conditioned upon the adoption of a certain route have been held void as against public policy: Pierce, p. 60. Similar contracts do not appear to have been regarded in this light in England. In *Raphael v. Thames Valley R.W. Co.*, L.R. 2 Eq. 37, Lord Romilly, M.R., refused to grant an injunction restraining a railway from operating until a condition was performed, on the ground that the rights of the travelling public should be considered, but he gave a reference as to damages, thus showing that he considered the agreement perfectly valid, and on appeal his decision was reversed and an injunction was granted regardless of the public interests, the existence both of the condition, and of a breach of it, being clear: see L.R. 2 Ch. 147, and *Wilson v. Northampton and Banbury Junction R.W. Co.*, 9 Ch. App. 279. It will probably be convenient to consider these cases under the headings already suggested, as follows:—

(1) *Whether the covenant is ultra vires.* This is a question too broad to be elaborately discussed in a note. *Whitby v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 265, is an example of provisional directors making a contract which apparently would have been binding on the company had it been one within its general corporate powers and within those of its co-contractors, the town of Whitby. Provisional directors having a general power to conduct the affairs of a railway may bind it by an informal contract for services performed: *Allen v. Ontario and Rainy River R.W. Co.*, 29 O.R. 510, and they may perform the

usual duties necessary to the management of the undertaking, such as dismissing employees: *O'Dell v. Boston and Nova Scotia Coal Co.*, 29 N. S. R. 385; their general powers under the Canadian Railway Act being defined by section 53, *ante*, but they cannot, of course, bind the company by any contracts not expressly or impliedly authorized by its charter: *Baroness Wenlock v. River Dee Company*, 10 A.C. 354; *Earl of Shaftesbury v. North Staffordshire R.W. Co.*, L.R. 1 Eq. 593; *Ashbury Carriage Co. v. Riche*, L.R. 7 H.L. 653. Where, as in *Whitby v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 265, 269, 276, the contract is with a municipal corporation, it also becomes a debatable question whether the latter had the necessary power to make the contract. As pointed out by Armour, C.J.O., in that case, at p. 273, the power to bonus railways did not exist in favour of municipalities in Ontario until 34 Vict. cap. 30 (O.), unless it was provided for in the Railway's Act of Incorporation; and for this reason such a provision was usually inserted in railway charters.

The powers of municipalities in this respect are discussed in *Canada Atlantic R.W. Co. v. Ottawa*, 8 O.R. 201, 12 A.R. 234, 12 S.C.R. 365; *Bickford v. Chatham*, 14 A.R. 32, 16 S.C.R. 235; *Grand Junction R.W. Co. v. Peterborough*, 8 S.C.R. 76, 13 A.C. 136; *Quebec Warehouse Co. v. Levis*, 11 S.C.R. 666; *St. Cesaire v. McFarlane*, Mont. L.R. 2 Q.B. 160, 14 S.C.R. 738; *Pontiac v. Ross*, 17 S.C.R. 406; but as these cases do not deal with the powers and duties of railways so much as of municipalities, they are not now enlarged upon here. As already mentioned, it has sometimes been held in the United States that contracts for the location of the line or some or one of its stations in a particular place have been declared *ultra vires*: *Pierce*, p. 513; but no such decision, other than the *Whitby Case*, has been found in England or Canada. The question must always largely turn on whether express or implied statutory power has been given to railways to receive benefits and give covenants imposing corresponding liabilities, and sufficient authority will now generally be found either in the Acts of Incorporation or in the general statutes, if any, incorporated with them. The *Whitby Case* is, however, authority for the proposition that the directors of a railway company have not, without express statutory authority, power to bind it by a contract imposing for all time a peculiarly onerous condition.

(2) *What constitutes a fulfilment of such conditions.* This must, of course, turn largely upon the form of words used, and no rule can well be laid down, except that performance or non-performance must depend upon the language employed. Where the contract requires a certain thing to be done off the railway lands, such as the making of a road, as in *Raphael v. Thames Valley R.W. Co.*, 2 Ch. App. 147; the building of a road and wharf and their subsequent maintenance: *Wilson v. Furness R.W. Co.*, L.R. 9 Eq. 28, or an arch: *Storer v. Great Western R.W. Co.*, 2 Y. & C.C.C. 48; specific performance of the agreement has been decreed, and a grant of lands subject to making such roads, ways and slips for cattle as might be necessary: *Sanderson v. Cockermouth Workington R.W. Co.*, 11 Beav. 497: or a covenant not to build any building higher than 18 feet within a distance of 80 feet from plaintiff's houses: *Lloyd v. London. Chatham and Dover R.W. Co.*, 2 D.J. & S. 568; may be the basis for similar relief; and in all these cases the possible detriment to the railway was considered to be no answer to a demand for the enforcement of a covenant deliberately made for valuable consideration. In *Bickford v. Chatham*, 10 O.R. 257, 14 A.R. 32. and 16 S.C.R. 235, these questions were much discussed, and a majority of the judges decided that an agreement to construct a freight and passenger station, with all necessary accommodation, connected by switches, sidings, or otherwise, with another road, was not complied with by the erection of a station not used or intended to be used, and for which the usual officers, such as station master, etc., were not provided, and that the words "all necessary accommodation" required that grounds and yards sufficient for freight and passenger traffic in case the station were used, should be provided. Strong, J., in that case also, held that the words employed did not amount to a covenant to run trains to that station or to make any other use of it: see 16 S.C.R., at pp. 279, *et seq.* The words "erect, set up and construct a station" do not impose an obligation to use it after it has been built: *Wilson v. Northampton R.W. Co.*, 9 Chy. App. 279, and "to make, form and construct, and thereafter maintain so long as the same shall be of convenience, a siding connected with their railway at B., together with all necessary approaches thereto, for public use for the reception and delivery of goods, wares, merchandise, and other matters, and things to and from the surrounding neighbourhood," does not mean to make a "siding with all proper conveniences connected therewith," and does

not lay any obligation upon a railway company to build sheds in addition to the siding: *Lytton v. Great Northern R.W. Co.*, 2 K. & J. 394. These cases seem to suggest that where specific performance is asked, the minimum of relief will be granted, and no more will be decreed in the plaintiff's favour than the very words of the contract call for. It may be that where damages are granted, a more liberal view will be adopted. In British Columbia it has been held in a judgment given upon a demurrer, that the fact of an injunction having been granted restraining the further prosecution of the work agreed to be done is a good defence to an action brought for damages for non-performance of the contract: *Attorney-General v. Canadian Pacific R.W. Co.*, 1 B.C.R., Part II., 350.

3. *Whether a covenant is perpetual or temporary* depends again upon the construction of each particular contract. The rule may be stated in general terms to be that there is no principle or policy of the law which will prevent such a covenant from being construed as perpetual, if apt words are used, but unless the wording or the context absolutely requires it, such contracts, if lived up to in good faith for a reasonable period, will not be construed as perpetually binding upon a railway company where, in the course of time, new conditions or a proper change of policy in the management of the road call for a departure from the contract: *Toronto v. Ontario and Quebec R.W. Co.*, 22 O.R. 344, citing *Texas R.W. Co. v. Marshall*, 136 U.S.R. 493. For instance, in *Gcauveau v. Great Western R.W. Co.*, 25 Gr. 62, 3 A.R. 412, a covenant to establish a station does not mean to permanently establish and maintain one, nor has a covenant to "place" a station any more extended effect: *Jessup v. Grand Trunk R.W. Co.*, 7 A.R. 128; but a covenant to "erect, keep and maintain . . . a permanent freight and passenger station" was, in *Township of Wallace v. Great Western R.W. Co.*, 25 Gr. 86, 3 A.R. 44, construed as perpetual.

These three cases and that of *Bickford v. Town of Chatham*, 14 A.R. 32, 16 S.C.R. 235, were reviewed in *Nottawasaga v. Hamilton and North-Western R.W. Co.*, 16 A.R. 52, where it was held again that the word "establish" does not mean to permanently maintain, that a consent judgment to restrain defendants from ceasing to maintain stations which they had agreed to maintain for seven years does not extend their liability beyond the seven years, and that evidence of verbal statements

made by directors that the agreement was intended to be perpetual was inadmissible. Where there is, however, a definite condition in a bond to remain independent for twenty-one years, and within that period the railroad amalgamates with another, there is a clear breach of the condition, and the amount secured by the bond being the amount paid to defendants, was recovered as liquidated damages: *Halton v. Grand Trunk R.W. Co.*, 19 A.R. 252, 21 S.C.R. 716.

In *Texas Railway Co. v. Marshall*, 136 U.S.R. 393, a covenant to "permanently establish" a terminus at the city of Marshall was held to be satisfied by establishing its works there "in the ordinary course of its business, with the purpose that it should be permanent," even though subsequent events rendered a change of policy and a removal of its terminus necessary in the best interests of the road; and this principle has been adopted in *Toronto v. Ontario and Quebec R.W. Co.*, 22 O.R. 344, already cited.

4. *Whether a covenant by a railway company has been waived by the parties or annulled by subsequent legislation.* The parties to a contract may, of course, by express words, waive their rights under it, and a similar result follows where an intention to waive can be gathered from their acts, and so where an agreement called for a first-class station, and the plaintiff or his predecessors saw the building put up and made no objection then or for several years after, it was held that he was precluded from showing that some other kind of station was intended: *Hood v. North Eastern R.W. Co.*, L.R. 8 Eq. 666, 5 Chy. 525. As to the abrogation of such contracts by subsequent legislation, there is nothing in the Canadian constitution to prevent a legislature, in whom the general right of legislating upon a question is vested, from annulling a contract already made, unless it be the general powers of disallowance contained in the British North America Act, and so we have no need to discuss the constitutional question so often debated in the United States (see, for instance, 25 American Law Register, 81), but, at the same time, where amalgamations, consolidations or re-arrangements are entered into and legalized by statute, all existing liabilities are generally expressly saved, so that while railway companies have pleaded that their obligations have been annulled by special Act, this defence has not been judicially upheld. See particularly *Cayley v. Cobourg, Peterborough and Marmora*

R.W. Co., 14 Gr. 571; *Attorney-General v. Birmingham*, 15 Ch. D. 423, and *Fargey v. Grand Junction R.W. Co.*, 4 O.R. 232. The rule laid down by Mr. Justice Osler, at p. 243 of this case, is that "where the terms of a statute are not imperative, but, as here, optional or permissive, the fair inference is that the Legislature intended that the discretion as to the use of general powers thereby conferred, should be exercised in strict conformity with private rights:" see also *Edinburgh and Glasgow R.W. Co. v. Campbell*, 9 Law Times N.S. 157, 4 Macq. H.L. 570.

5. *Whether a mandamus, injunction, specific performance, or damages is the proper remedy.* The writ of mandamus is a command issuing in the King's name to perform a plain legal duty, and is usually employed only where no other sufficient remedy can be had in the Courts. Where, as is frequently the case, agreements in which railways are concerned are legalized and validated by statute, there is not only a binding duty but a legal obligation imposed, and in such cases where there is a speedier and more ample remedy by writ of mandamus, that has been granted in lieu of damages: *Ex p. The Attorney-General of New Brunswick, Re The New Brunswick and Canada R.W. Co.*, 17 N.B.R. 667; but where an equally efficient remedy may be had in an action, a writ of mandamus will not be granted: *Quebec v. Montreal and Sorel R.W. Co.*, 7 L.N. 5. For an interesting article on the history of this proceeding and its extension in modern times, see 102 Law Times Journal, p. 420.

In Ontario, where debentures were issued under the provisions of a statute, a mandamus was granted upon the application of creditors, who became entitled to the debentures upon the company's default in paying advances, for registration as holders of the debentures so as to enable them to vote: *Re Thomson and the Victoria R.W. Co.*, 8 P.R. 423; see also *Re Osler v. Toronto, Grey and Bruce R.W. Co.*, 8 P.R. 506; *Re Johnson v. Toronto, Grey and Bruce R.W. Co.*, *ibid.*, p. 535.

It has been stated by Mr. Justice Gwynne, in *Grand Junction R.W. Co. v. Peterborough*, 8 S.C.R. at pp. 121, *et seq.*, that the prerogative writ of mandamus is not in Ontario applicable as a remedy to enforce specific performance of what are in effect mere personal contracts, even though validated by statute, and that such relief must be obtained in an action, and this decision was followed in *Re Canada Atlantic R.W. Co. v. Cambridge*, 3 O.R. 291; but in *Kingston v. Kingston, etc., Electric*

R.W. Co., 28 O.R. 399, 25 A.R. 462, it was decided that the prerogative writ of mandamus can only be obtained on a motion and not in an action, and that it is not a remedy which can be employed to enforce rights under a contract, even though the contract has received legislative sanction: *Re London, Huron, and Bruce R.W. Co.*, 36 U.C.R. 93; *Re Hamilton and North-Western R.W. Co.*, 39 U.C.R., at p. 111, and *Kingston v. Kingston, etc., R.W. Co.*, 25 A.R., at p. 469.

Injunction or Damages. The general principles upon which the Courts act in granting or refusing an injunction (mandatory or otherwise), were discussed in *Shelfer v. London Electric Lighting Co.* (1895), 1 Ch. 287, and the following general rules laid down by A. L. Smith, L.J., bear sufficiently upon our subject to be quoted: (1) If the injury to the plaintiff's legal right is small; (2) and is capable of being estimated in money; (3) is one which can be adequately compensated by a small money payment; (4) and the case is one in which it would be oppressive to the defendant to grant an injunction, damages in lieu of an injunction may be awarded.

If these four requirements are found in combination in a case, then damages in substitution for an injunction may be given.

There is a fifth general rule well illustrated by the case of *Kingston v. Kingston, Portsmouth and Cataraqui Electric R.W. Co.*, 28 O.R. 399, 25 A.R. 462, where the Court would not grant a mandatory injunction to compel a railway to run cars over the whole of its line during the whole of the year, because it could not see to the enforcement of such a decree in all its details: see also *Bickford v. Town of Chatham*, 16 S.C.R. 235, where the same rule was laid down. In *Wilson v. Northampton, etc., R.W. Co.*, L.R. 9 Ch. 279, defendants frankly admitted their breach of a covenant to erect a station and other works and offered to pay damages, but resisted plaintiff's claim for an injunction. The Court, while condemning the defendants' conduct as a breach of faith, directed an inquiry as to damages on the ground that in this way justice could better be done to the plaintiff than by a decree for specific performance, as the terms of the contract were indefinite, and the Court by specific performance could only give the plaintiff the very minimum of what was expressed, whereas in an inquiry as to damages, everything might be pre-

sumed in favour of the plaintiff. The principles invoked in these cases are laid down also in *St. Thomas v. Credit Valley R.W. Co.*, 7 O.R. 332, 12 A.R. 273, where plaintiffs sought to compel defendants to run to a certain point in St. Thomas pursuant to agreement, but this was held unenforceable and damages were given instead, and in *Brussels v. Ronald*, 11 A.R. 605, at p. 614.

On a subsequent occasion (*St. Thomas v. Credit Valley R.W. Co.*, 15 O.R. 673), it was held that the measure of damages which the city might recover for breach of this agreement would not include personal loss or inconvenience suffered by travellers or citizens, nor damages for depreciation of property, but would include damages for loss of taxes arising from such depreciation.

The English cases in which an injunction or specific performance were granted were reviewed by MacLennan, J.A., in his dissenting judgment in *Kingston v. Kingston, etc., Electric R.W. Co.*, 25 A.R., at p. 472, *et seq.* It may be noted that specific performance or an injunction is more readily granted where something is to be done off the line of railway, while damages are the more frequent form of relief where the other remedies would interfere with the operation of the road. In *Sanderson v. Cockermouth R.W. Co.*, 11 Beav. 497, specific performance of a contract to construct and maintain roadways and slips for cattle was decreed. In *Lytton v. Great Northern R.W. Co.*, 2 K. & J. 394, a similar decree was made for the construction of a siding with approaches. In *Lindsay v. Great Northern R.W. Co.*, 10 Hare 664, a company was restrained from passing a station without stopping, and see also *Rigby v. Great Western R.W. Co.*, 2 Ch. App. 44. In *Hood v. North Eastern R.W. Co.*, 8 Eq. 666, 5 Ch. 525, and *Wallace v. Great Western R.W. Co.*, 3 A.R. 44, railway companies were ordered to erect stations. In *Wilson v. Furness R.W. Co.*, 9 Eq. 28, a road and wharf, and in *Raphael v. Thames Valley R.W. Co.*, 2 Ch. 147, a road and approaches were ordered to be built, and in *Storer v. Great Western R.W. Co.*, 2 Y. & C.C.C. 48, an archway was ordered to be built pursuant to a contract in that behalf, but where there was a contract to erect a station with switches, sidings and all necessary accommodation, and to keep a stationmaster and other officers there, and to stop all ordinary trains there, and use that station as the main station, it was held that such an agreement could not be specifically performed: *Bickford v. Chatham*, 10 O.R. 257, 14 A.R. 32, 16 S.C.R. 235.

Wages of Labourers.

205. In every case in which the Parliament or (*sic*) Canada votes financial aid by way of subsidy or guarantee towards the cost of railway construction, all mechanics, labourers, or other persons who perform labour on such construction, shall be paid such wages as are generally accepted as current for competent workmen in the district in which the work is being performed; and if there is no current rate in such district, then a fair and reasonable rate; and in the event of a dispute arising as to what is the current or a fair and reasonable rate, it shall be determined by the Minister, whose decision shall be final.

Rate of wages of labourers on construction of lines subsidized by Parliament.

This section is new. Similar legislation is to be found in various provincial enactments which grant subsidies to railways and which impose as a term of payment a provision that all workmen employed on the undertaking shall be paid the current rate of wages in the locality. See, for instance, 4 Edw. VII., cap. 18, sec. 62 (Ont.), and similar general provisions for payment of labourers employed on public works or on railways chartered by the Province, contained in R.S.O. (1897), cap. 155, sec. 5.

The above provision is so general in its terms that it would appear to be necessary for subsidized railways to exact a similar stipulation from all persons to whom they let a contract for the construction of any portion of their roads which may be subsidized.

The term "Minister" employed in this section refers to the Minister of Railways and Canals under section 2 (O.), *ante*, and not to the Minister of Labour.

PART VIII.

INSPECTION OF RAILWAY.

Inspecting engineers, sec. 206.

Inspection—

Before opening, sec. 207.

When out of repair, sec. 208 to 210.

Inspecting Engineers.

Appoint-
ment of
inspect-
ing
engineers.
Duties.

206. Inspecting engineers may be appointed by the Minister or the Board, subject to the approval of the Governor in Council.

2. It shall be the duty of every such inspecting engineer, upon being directed by the Minister or the Board, as the case may be, to inspect any railway, or any branch line, siding, or portion thereof, whether constructed, or in the course of construction, to examine the stations, rolling stock, rails, road bed, right of way, tracks, bridges, tunnels, trestles, viaducts, drainage, culverts, railway crossings and junctions, highway and farm crossings, fences, gates, and cattle-guards, telegraph, telephone, or other lines of electricity, and all other buildings, works, structures, equipment, apparatus, and appliances thereon, or to be constructed or used thereon, or such part thereof as the Minister or the Board, as the case may be, may direct, and forthwith to report fully thereon in writing to the Minister or the Board, as the case may be.

Powers of
inspection.

3. Every such inspecting engineer shall be vested with all the powers in regard to any such inspection as are provided in section forty-nine.

4. Every company, and the officers and directors thereof, shall afford to any inspecting engineer such information as is within their knowledge and power, in all matters inquired into by him, and shall submit to such inspecting engineer all plans, specifications, drawings, and documents relating to the construction, repair, or state of repair, of the railway, or any portion thereof. 51 V., c. 29, s. 26.

5. Every such inspecting engineer shall have the right, while engaged in the business of such inspection, to travel without charge on any of the ordinary passenger trains running on the railway, and to use without charge the telegraph wires and machinery in the offices of, or under the control of, any such company. 51 V., c. 29, s. 27, Am.

6. The operators, or officers, employed in the telegraph offices of, or under the control of, the company, shall, without unnecessary delay, obey all orders of any such inspecting engineer for transmitting messages; and every such operator or officer who neglects or refuses so to do, shall, for every such offence, be liable, on summary conviction, to a penalty of forty dollars. 51 V., c. 29, s. 28.

7. The production of his appointment in writing, signed by the Chief Commissioner of the Board, or the Secretary, or by the Minister, shall be sufficient evidence of the authority of such inspecting engineer. 51 V., c. 29, s. 29, Am.

8. Every person who wilfully obstructs any inspecting engineer in the execution of his duty, is liable, on summary conviction, to a penalty not exceeding forty dollars; and in default of payment thereof forthwith, or within such time as the convicting justice or justices of the peace appoint, to imprisonment with or without hard labour for any term not exceeding three months. 51 V., c. 29, s. 30.

Sub-sections 1, 2 and 3 of this section are new, sub-section 4 is identical with section 26 of the Act of 1888, sub-section 5

gives the right to travel only on the "ordinary passenger trains" of the company, whereas under section 27 of the Act of 1888 the right to travel on the company's trains was unlimited: sub-sections 6, 7, and 8 are transcripts of sections 28, 29, and 30 of the Act of 1888, with the substitution of the Chief Commissioner and Secretary of the Board of Railway Commissioners for the Chairman and Secretary of the Railway Committee.

Inspection of Railway.

Leave of Board before opening. **207.** No railway, or any portion thereof, shall be opened for the carriage of traffic, other than for the purposes of the construction of the railway by the company, until leave therefor has been obtained from the Board, as hereinafter provided.

Pro-ceedings. 2. When the company is desirous of so opening its railway, or any portion thereof, it shall make an application to the Board, supported by affidavit of its president, secretary, engineer, or one of its directors, to the satisfaction of the Board, alleging that the railway, or portion thereof, desired to be so opened is, in his opinion, sufficiently completed for the safe carriage of traffic, and ready for inspection, and request the Board to authorize the same to be opened for such purpose.

Affidavit.

Inspection. 3. Before granting such application, the Board shall direct an inspecting engineer to examine the railway, or portion thereof, proposed to be opened, and if the inspecting engineer reports to the Board, after making such examination, that in his opinion the opening of the same for the carriage of traffic will be reasonably free from danger to the public using the same, the Board may make an order granting such application, in whole or in part, and may name the time therein for the opening thereof, and thereupon the railway, or such portion thereof as is authorized by the Board, may be opened for traffic in accordance with such order.

When opening reported to be safe.

Order of Board.

4. But if such inspecting engineer, after the inspection of the railway, or the portion thereof, shall report to the Board that in his opinion the opening of the same would be attended with danger to the public using the same, by reason of the incompleteness of the works or permanent way, or the insufficiency of the construction or equipment of such railway, or portion thereof, he shall state in his report the grounds for such opinion, and the company shall be entitled to notice thereof, and shall be served with a copy of such report and grounds, and the Board may refuse such application, in whole or in part, or may direct a further or other inspection and report to be made.

When opening reported dangerous.

Notice to be served on company.

5. If thereafter upon such further or other inspection or upon a new application under this section, the inspecting engineer reports that such railway, or portion thereof, may be opened without danger to the public, the Board may make the like order as provided in sub-section 3 of this section and thereupon the railway, or such portion thereof as is authorized by the Board, may be opened for traffic in accordance therewith.

Provision for further inspection.

Order for opening.

6. The Board, upon being satisfied that public convenience will be served thereby, may, after obtaining a report of an inspecting engineer, allow the company to carry freight traffic over any portion of the railway not opened for the carriage of traffic in accordance with the preceding provisions of this section.

Leave to carry freight traffic.

7. If any railway or portion thereof is opened contrary to the provisions of this section, the company, or person to whom such railway belongs, shall forfeit to His Majesty the sum of two hundred dollars for each day on which the same is, or continues, open until such order is obtained. 51 V., c. 29, ss. 200 to 203, Am.

Opening without leave of Board.

Penalty.

This section is an amendment and consolidation of sections 200 to 203 of the Act of 1888. It is based upon the English

Regulation of Railways Acts, 5 & 6 Vict., cap. 55, secs. 45 and 46, and 36 & 37 Vict., cap. 76, sec. 6, the latter section being in most respects similar to sub-section 4 *supra*.

Until a railway is declared to be open for public traffic the company is not subject to the liabilities of common carriers, nor bound as such to carry whatever traffic is offered, unless it has invited the public to use it or has held itself out as ready to receive ordinary traffic: *Macrae v. Canadian Pacific R.W. Co.*, Mont. L.R. 4 Q.B. 191. *Browne v. Brockville & Ottawa R.W. Co.*, 20 U.C.R. 202, is a case in which the liability of a railway company for the negligence of a contractor while the road was under construction, was somewhat discussed and the opinion was expressed, though no definite decision was given, that under such circumstances the company would not be liable for injuries due to the contractor's negligence.

Where the down line of a railway had been approved in England under 36 & 37 Vict., cap. 76, sec. 6, (similar to sub-section 4 *supra*), and the up line, though not approved, had also been open for traffic, an injunction restraining the use of the up line by the company was granted at the instance of the Attorney General and it was held that the Board in England was not *functus officio* because it had approved of the opening of the down line. It was also held that the Court would not review the decision of the Board nor the grounds on which the Inspector had based his report. The Board having declared its decision, that without more, was sufficient to enable the Court to act at the instance of the Attorney General: *Attorney General v. Oxford, etc., R.W. Co.*, 2 W.R. 330; followed and approved: *Attorney General v. Cockermouth*, L.R. 15 Eq. at p. 178. The mere fact that an illegal act is being committed, such as the attempt to operate a new railway or portion thereof before the sanction of the Board is obtained, is sufficient in all such cases to justify an injunction at the instance of the Attorney General without proof of the existence of any actual damage: *Attorney General v. Shrewsbury Bridge Co.*, 21 Ch.D. 752; *Attorney General v. London & North Western R.W. Co.*, (1900), 1 Q.B. 78.

The prohibition contained in this section is equally applicable to the whole railway or to a portion thereof. After operating a line for some years after it had been approved, a railway laid a new line parallel to their main line for about a mile

and substituted a new for an old junction at a point nearly opposite to the old one and also made two new stations on the new line, it was held that the new portion should not have been used without previous notice to the Board of Trade: *Attorney General v. Great Western R.W. Co.*, L.R. 7 Ch. 767.

Where an inspector under the corresponding English section reports that the opening of a railway will be attended with danger to the public by reason of the incompleteness of the works and gives the grounds of his decision, the provisions of the statute are satisfied, the Board of Trade has exclusive jurisdiction in the matter, and the Court will not enter into the question whether the reasons given by the Inspector do not show on its face that he has come to a wrong conclusion: *Attorney General v. Great Western R.W. Co.*, 4 Ch.D. 735.

The mere fact that the work has been approved by an officer of the Board appointed to supervise or inspect it would not relieve the company from negligence for any subsequent defect whereby an accident happens; see notes to section 195 (f) *ante*. Section 242 sub-section 3 *infra* also expressly provides that no inspection shall relieve the company from any liability otherwise imposed by law.

203. Whenever any complaint is made to the Board, or the Board receives information, that any railway, or any portion thereof, is dangerous to the public using the same, from want of renewal or repair, or insufficient or erroneous construction, or from any other cause, or whenever circumstances arise which, in its opinion, render it expedient, the Board may direct an inspecting engineer to examine the railway, or any portion thereof; and upon the report of the inspecting engineer may order any repairs, renewal, reconstruction, alteration or new work, materials or equipment to be made, done, or furnished by the company upon, in addition to, or substitution for, any portion of the railway, which may, from such report, appear to the Board necessary or proper, and may order that until such repairs, renewals, reconstruction, alteration, and work, materials or equipment are made, done and furnished to its satisfaction, no such portion of the railway in respect of which

Where
railway
out of
repair.

Inspection.

Board
may
order
repairs,
etc.

May en-
join use
of
portions

of rail-
ways
pending
repairs.

Or of
equip-
ment.

such order is made, shall be used, or used otherwise than subject to such restrictions, conditions and terms as the Board may in such order impose. And the Board may by such order, condemn, and thereby forbid further use of, any rolling stock which, from such report, it may consider unfit to repair or use further.

Penalty
for non-
com-
pliance.

Aiding
and
abetting.

2. If, after notice of any such order made by the Board, the company shall use any rolling stock, after the same has been so condemned by the Board, or shall disobey or fail to comply with any order of the Board made under this section, the company shall, for each act of disobedience, forfeit to His Majesty the sum of two thousand dollars; and any person wilfully and knowingly aiding or abetting any such violation shall be guilty of an offence, and on conviction thereof shall be liable to a penalty of not less than twenty, nor more than two hundred dollars. 51 V., c. 29, s. 205, Am.

See notes to sections 206 and 207.

Inspect-
ing
engineer
may in
case of
danger
issue
prohibi-
tions.

Pro-
cedure.

Reasons
and
defects
must be
stated.

Penalty.

209. If in the opinion of any inspecting engineer, it is dangerous for trains to pass over any railway, or any portion thereof, until alterations, substitutions or repairs are made thereon, or that any of the rolling stock should be run or used, the said engineer may, by notice, forthwith, either forbid the running of any train over such railway or portion of railway, or require that the same be run only at such times, under such conditions, and with such precautions, as he, by notice specifies, and he may forbid the running or using of any such rolling stock by serving upon the company owning, running or using such railway, or any officer having the management or control of the running of trains on such railway, a notice in writing to that effect, with his reasons therefor, in which he shall distinctly point out the defects or the nature of the danger to be apprehended; and for every act of non-compliance therewith such company shall forfeit to His Majesty the sum of two thousand dollars. 51 V., c. 29, s. 210, Am.

2. The inspecting engineer shall forthwith report the same to the Board, which may either confirm, modify or disallow the act or order of such engineer; and notice of such confirmation, modification or disallowance shall be duly given to the company. 51 V., c. 29, s. 211, Am.

Report of
inspect-
ing
engineer.
Action
thereon.
Notice.

See notes to sections 206 and 207.

210. No prosecution for any penalty under the last two preceding sections shall be instituted without the authority of the Board first had and obtained.

Prosecu-
tion for
penalties
must be
autho-
rized.

PART IX.

OPERATION OF RAILWAY.

Trains—

- Equipment, apparatus and appliances, sec. 211 to 213.
- Accommodation and running of trains, sec. 214 to 231.
- Carriage of mails, naval and military forces, etc., see 232.
- Telegraphs and telephones, sec. 233, 234.
- Accidents, sec. 235, 236.
- Animals at large, sec. 237.
- Weeds on company's land, sec. 238.
- Prevention of, and liability for, fires, sec. 239.
- Purchase of railway by person without corporate power to operate, sec. 240.
- Railway constables, sec. 241.
- Actions for damages, sec. 242.

General Note on Negligence in Operating Railways.

The subject of negligence in failing to comply with the provisions of the statute respecting the operation of railways will be dealt with under their particular heads; but the following general remarks are made by way of introduction.

Breach of Statutory Duty. It has been said that where there is a duty imposed by a statute such as the "Factories Act" of Ontario for which a penalty is provided, a person injured has no civil right or remedy of suing for damages which he personally suffered through the breach of the statute: *Roberts v. Taylor*, 31 O.R. 10; but the principle of this case was disaffirmed and over-ruled by the Court of Appeal for Ontario, in *Fahey v. Jephcott*, 2 O.L.R. 449, reversing the judgment of Street, J., at the trial, reported 1 O.L.R. 18.

This may now be considered as settled law, as the same principle was laid down in England in *Groves v. Wimborne* (1898), 2 Q.B. 402, and in the later Canadian cases of *Myers v. Sault Ste. Marie Pulp Co.*, 3 O.L.R. 600; *Sault Ste. Marie Pulp Co. v. Myers*, 33 S.C.R. 23; and *Billing v. Semmens*, 7 O.L.R. 340,

8 O.L.R. 540. This rule cannot be said to exist in the Province of Quebec, where the Factories Act is treated as a police regulation only and not as affecting the civil responsibility of employers towards their employees: *Montreal Rolling Mills v. Corcoran*, 26 S.C.R. 595.

So far, therefore, as railway companies come within the provisions of any Provincial Factories Act (except the Quebec Statute) in regard to the use of machinery or premises within the meaning of that Act, it may be taken that even though no civil right of action is provided by the statute, a person injured owing to failure to comply with it, may recover damages based upon the company's negligence in failing to provide statutory safe-guards exacted for his protection.

A similar question arises under the Railway Act because there are many sections imposing special duties upon railways for which no express civil remedy is given. By section 294 *infra* which prescribes penalties for any act or omission contrary to the statute for which no specific penalty is named, it is also provided that a company "doing or omitting to do anything required by the Act" is liable to any person injured thereby for the full amount of damages sustained by such act or omission. In *Curran v. Grand Trunk R.W. Co.*, 25 A.R. 407, sec. 289 of the Act of 1888, corresponding to sec. 294 of the present statute, was considered and it was laid down that, not only did the section give a right of action to anyone injured on account of a breach of the Railway Act, but that in the case of a workman thus injured, he was not limited to the damages given by the "Workman's Compensation Act" of Ontario, but ought to recover, in the terms of the statute, "the full amount of damages sustained." See also *Washington v. Grand Trunk R.W. Co.*, 24 A.R. 183, 28 S.C.R. 184; *Grand Trunk R.W. Co. v. Washington*, (1899) A.C. 275. Apart therefore from any general principle enunciated in the cases decided under the "Factories Act", it is safe to assume as a general proposition that failure to comply with the terms of the Railway Act confers as a rule a right of action upon any person injured thereby who can bring himself within the remedial operation of the statute.

Liability to Public for Servant's Negligence. In considering whether a master is liable for the acts of his servant resulting in injury to a third person or persons, the question in

each case is whether the servant acted within "the scope of his employment," and if the answer is in the affirmative, the master is liable for the consequences even though what the servant did was wrongful and may have been contrary to the express instructions of the master: *Limpus v. London General Omnibus Co.*, 1 H. & C. 526; *Poulton v. London, etc., R.W. Co.*, L.R. 2 Q.B. 534; *Allen v. London, etc., R.W. Co.*, L.R. 6 Q.B. 65; *Emerson v. Niagara Navigation Co.*, 2 O.R. 528; *Coll v. Toronto R.W. Co.*, 25 A.R. 55; *Steadman v. Baker*, 12 Times, L.R. 451; *Hanson v. Waller* (1901), 1 K.B. 390; *Dawdy v. Hamilton, etc., R.W. Co.*, 2 Can. Ry. Cas. 196; and this rule is applied so as to render a railway company liable for a circular issued by its general manager which was found to be libellous, as it was considered that the manager had sufficient authority, acting in the course of his duty, to render his employers liable for a libel upon one of their conductors: *Tench v. Great Western R.W. Co.*, 32 U.C.R. 452, 33 U.C.R. 8. If, however, the company itself had no right to do the act complained of, then it would be impossible to delegate to an employee power which the company does not possess, and could not lawfully exercise, and there is no liability for acts of such a nature done by a servant arising from any theory of the delegation of an implied authority, and so, where a railway company had power to arrest for non-payment of a passenger's fare, but had no power to arrest for non-payment of freight shipped by a customer, it was held that it could not be made liable to a person arrested by its station-master for failure to pay freight on goods shipped: *Poulton v. London, etc., R.W. Co.*, L.R. 2 Q.B. 534.

The onus of proving that a servant was acting within the scope of his duty or authority is on the plaintiff, and therefore where an omnibus driver was absent and the conductor drove it and no evidence was given that he had any right to do so, a person injured by the conductor's negligence or negligent driving was unable to recover damages from the owner: *Beard v. London General Omnibus Co.* (1900), 2 Q.B. 530.

Where a baggageman assaulted a passenger, it was held that the defendants were not liable because he did not act as their servant "or in pursuance of his powers", *Cunningham v. Grand Trunk R. W. Co.*, 31 U.C.R. 350, but a company has been held liable where section men in promoting the objects for which they are employed did so in a careless or negligent way, thereby

injuring a third person: *Vars v. Grand Trunk R.W. Co.*, 23 U.C. C.P. 143; and where a wrecking crew employed in lifting an engine which has been derailed allowed steam to escape, thereby frightening plaintiff's horse and injuring her, the defendants were held liable: *Stott v. Grand Trunk R.W. Co.*, 24 U.C.C.P. 347. This case was somewhat near the line, as the circumstances suggested mere horse play on the part of the wrecking crew, and not a mistaken attempt to further the master's interests. A somewhat similar action decided in a similar way is *Hammond v. Grand Trunk R.W. Co.*, 4 O.W.R. 530. That was a case in which the gateman employed to lower gates threw a cinder at a boy who was leaning on them preventing their being raised. The plaintiff's eye was put out and he brought an action against the gateman and the company. It was contended that the plaintiff could not recover as the gateman acted out of malice and ill-temper, and not in the company's interests. The following quotation from the charge of the Trial Judge (Anglin, J.) clearly explains the distinction. "Now, what was the object with which Jarman threw that cinder? If he threw it in a moment of irritation—annoyed at the boys being on the gates—and not for the purpose of getting them away so that he could open the gate, but simply to gratify some spiteful feeling of his own against the boys, then it was not an act done in the course of his employment, and the railway company would not be responsible for it. If, on the other hand, his object was not to hit the boy, but to attract his attention and get him away from the gates so that they could be opened, you would probably come to the conclusion that he did it in the course of his employment—the opening of the gates—and if you reach that conclusion then that makes the employers liable for the act which the servant did." This charge was approved by the Divisional Court. On this subject see also *Sanderson v. Collins*, (1904) 1 K.B. 628; *Forsythe v. Canadian Pacific R.W. Co.*, 5 O.W.R. 73.

Liability to the Public for Wrongful Acts of Others. Under certain circumstances a railway company has been held liable to passengers for injuries done by a fellow passenger where the conductor knew of the danger of an attack upon the plaintiff and failed to prevent it: *Blain v. Canadian Pacific R.W. Co.*, 2 Can. Ry. Cas. 69 and 85, 3 Can. Ry. Cas. 143. But where the injury has been caused by the action of a trespasser

on a railway company's premises loosening a brake and allowing a car to run down an inclined siding to the highway. where-by the plaintiff was injured the defendants were excused: *MacDowall v. Great Western R.W. Co.* (1903), 2 K.B. 331. Where defendants knowingly allowed a great crowd of intending passengers to congregate on the station platform and did not have a sufficient staff to cope with the crowd that might have been expected, they were held liable for injuries to persons pushed from the platform in the crush: *Frascr v. Caledonia R.W. Co.*, 5 F. (Ct. of Sess.) 42. Under certain circumstances the company may also be liable for the negligence of a contractor or sub-contractor. The general rule, however, is that a person is not responsible for the negligence of an independent contractor where the work to be done could not, in the ordinary course, lead to injurious consequences, but being delegated to an independent contractor is so negligently carried out by him as to cause injury to another: *Bower v. Peate*, 1 Q.B.D. 321; *Pearson v. Cox*, 2 C.P.D. 369. In *Williams v. Cunningham*, Q.R. 23 S.C. 263, a firm employed the defendants to move their effects from certain premises. While doing so a table was lowered from one of the upper windows and the plaintiff (who was not an employee of the defendants but of the firm whose furniture was being moved) while assisting the defendant's servants was injured by the table falling on him owing to their careless handling. It was held that as the defendants alone had charge of the moving and of the operations of their servants they were alone liable for the accident. Compare with this *Hurdman v. Canada Atlantic R.W. Co.*, 25 O.R. 209, 22 A.R. 292; and *Canada Atlantic R.W. Co. v. Hurdman*, 25 S.C.R. 205.

Liability of Master to Servant. At common law an employer is bound as part of his contract to take reasonable care in the carrying on of his business so as not to subject those employed by him to undue risk. If he does not do so he will be *prima facie* liable to an action; *Sington on Negligence*, 175; *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; and he must employ competent servants so as to protect other workmen against injury from their incompetency: *Sington, supra.* But where he does so, he is not liable at common law for injury suffered owing to the negligence of a fellow servant, where he has no knowledge of his incompetence: *Wood v. Canadian Pacific R.W. Co.*, 30 S.C.R. 110. He must also at common law maintain his pre-

mises in a reasonably safe condition and must use machinery which is reasonably fit and safe for the purposes for which it is intended, and if he does not do so he will be responsible in damages for any injury which the servant thereby suffers: *Bartonshill v. Reid*, 3 Macq. 266; *Bartonshill v. MacGuire*, 3 Macq. 310; *Sword v. Cameron*, 1 Sc. Sess. Cas. (2nd ser.) 493; *Kiddle v. Lovett*, 16 Q.B.D. 605. But where the accident happens through the unauthorized act of a fellow servant, not in accordance with, but, in fact, opposed to the usual system employed, the plaintiff cannot recover: *Alexander v. Miles*, 7 O.L.R. 103. If the system is faulty through the absence of some proper guard for the workman, that is evidence of negligence for which the plaintiff injured may recover: *Bisnaw v. Shields*, 7 O.L.R. 210, and so if a minor is put to work in a dangerous place without being warned by the foreman or superintendent of the danger, the employer will be liable: *Gunn v. Le Roi*, 10 B.C.R. 59. And in an appeal from the Province of Quebec it has been held that it is the duty of the employer not only to order the discontinuance of operations on insecure premises, but to take measures to insure the carrying out of such orders: *Lamoureux v. Fournier*, Q.R. 21 S.C. 99, 33 S.C.R. 675.

Common Employment. Before the Workman's Compensation Act, which has been re-enacted in several Provinces in Canada, it was held that an employer was not liable for any injury caused by the negligence of a fellow servant. That was supposed to have been one of the risks which the servant assumed as part of his contract: *Priestly v. Fowler*, 3 M. & W. 1. Some cases already cited bear this out. The same principle was adopted in the United States in *Farwell v. Boston R.W. Co.*, 4 Met. (Mass.) 49. And the doctrine has been extended so as to include those who are superintendents and foremen or are engaged in a different branch of the master's business, under the terms "fellow servants," so as to prevent an employee from recovering damages where injured by their negligence: *Wilson v. Merry*, L.R. 1 S. & D. 326; *Howells v. Landore*, L.R. 10 Q.B. 62; *Hastings v. Le Roi*, 10 B.C.R. 9, 34 S.C.R. 177. The doctrine of common employment does not exist in Quebec and there it is no answer to an action for negligence that the fault was that of a fellow-servant: *The Queen v. Fillion*, 24 S.C.R. 482; followed *The Queen v. Grenier*, 32 S.C.R. 42; *Asbestos v. Durand*, *ib.*, 285.

An employer or his partner are never treated, however, as fellow servants, and a servant could always recover for injuries occasioned by their negligence: *Ashworth v. Stanwix*, 30 L.J. Q.B. 183; *Wilson v. Merry*, *supra*. Nor is he regarded as a fellow servant even if he works with him: *Mellors v. Shaw*, 30 L.J.Q.B. 333. Nor can the master set up such a defence where there is a statutory duty actually imposed upon him which his servants failed to carry out: *Groves v. Wimborne* (1898), 2 Q.B. 402; *Billings v. Semmens*, 7 O.L.R. 340, 8 O.L.R. 540.

By various Workman's Compensation Acts similar in most respects to that passed in Ontario, R.S.O. (1897), cap. 160, sec. 3, it is provided that a master shall be liable under certain circumstances which did not previously exist. Five cases are given by section 3 which provides that the master shall be liable where any injury is caused:

1. By a defect in the ways, works, machinery, etc., used in the business of the employer.

2. By reason of the negligence of anyone in his service who has any superintendence entrusted to him while in the exercise of such superintendence.

3. By reason of the negligence of any one in his service to whose orders the workmen were bound to conform and did conform.

4. By reason of the act or omission of any one in his service done in obedience to the rules or by-laws of his employer or in obedience to particular instructions given by the employer or anyone having authority from him for that purpose.

5. By reason of the negligence of anyone in his service having charge or control of railway locomotives, signals or machines.

These are only the substance of what is there cited and the Act was further amended and enlarged in Ontario by 62 Vict. (2), cap. 18.

The following principles in dealing with this statute in its application to railway companies are suggested:

1. This legislation is applicable to railways within the jurisdiction of the Federal Parliament: *Canada Southern R.W. Co., v. Jackson*, 17 S.C.R. 316, but it may be doubted whether sec. 5 of that Act having reference to packing frogs and wing rails can apply to a Dominion Railway: *Washington v. Grand Trunk R.W. Co.*, 24 A.R. 183. This decision was reversed by

the Supreme Court; 28 S.C.R. 184, whose judgment was affirmed by the Privy Council (1899) A.C. 275; but the constitutional point decided by the Court of Appeal was left untouched, and having regard to such decisions as *Madden v. Nelson, etc., R.W. Co.*, 5 B.C.R. 541; (1899), A.C. 626, discussed in 2 Can. Ry. Cas. pp. 266 and 267, it is probable that sec. 5 of the above Act does not apply to Federal Railways.

2. The onus of proof in showing that there is negligence within the meaning of the Act is upon the plaintiff as in other actions: *Young v. Owen Sound Dredge Company*, 27 A.R. 649; but where the machine is dangerous, it is not necessary to produce the testimony of eye witnesses to explain how the accident happened and it is open for the jury to draw inferences from the facts showing negligence: *Godwin v. Newcombe*, 1 O.L.R. 525; *Griffiths v. Hamilton Light and Cataract Power Co.*, 6 O.L.R. 296. It does not follow, however, that whenever a workman uses a dangerous machine and is injured by it without any negligence on the part of the employer being shown, the latter is responsible for the injury unless he can prove negligence on the workman's part: *Walsh v. Whiteley*, 21 Q.B.D. 371.

3. The Ontario Workman's Compensation Act is wider in its scope than the English statute, for by section 6 as construed by the Ontario Courts an employer is liable for an injury to his servants due to a defect in the machinery caused by the negligence of a fellow servant employed by the master: *Markle v. Donaldson*, 7 O.L.R. 376, 8 O.L.R. 682. A somewhat similar case decided upon an appeal from the Nova Scotia Courts is *Grant v. Acadia Coal Co.*, 32 S.C.R. 427. The point was also recently raised in *Schwoob v. Michigan Central R.W. Co.*, 5 O.W.R. 157, where it was held that the defendants were answerable for the negligence of a person to whom they had entrusted the duty of seeing that a locomotive was repaired so as to make it safe for ordinary use, and it was held that if the defendants did not provide for a proper examination of the locomotive causing the injury and the defect would have been discovered if such examination had been made, they were answerable at common law for a breach of the duty which they owed the person injured of taking reasonable care to provide proper appliances and maintain them in a proper condition, and if on the other hand they did provide for such an examination but it was negligently carried out they were answerable

for the negligence of the person to whom they had entrusted the performance of that duty. See also *Glasgow v. Toronto Paper Manufacturing Co.*, 5 O.W.R. at page 108, and compare *Brunell v. Canadian Pacific R.W. Co.*, 15 O.R. 375, where the boiler burst owing to a fellow servant's lack of attention to it.

4. As already mentioned where there is provision made by statute for certain precautions to be used for the protection of an employee and those precautions are not used that is *prima facie* evidence of negligence: *Myers v. Sault Ste. Marie Pulp Co.*, 33 S.C.R. 23; *Billing v. Semmens*, 7 O.L.R. 340, 8 O.L.R. 540.

5. Where an action is brought and judgment rendered under the Workman's Compensation Act the damages are usually expressly limited by statute, and a jury cannot allow more than the statute permits.

Evidence of Negligence. In all cases there must be affirmative evidence of negligence and a jury is not justified in rendering a verdict upon mere conjecture or guess-work, but the liability of the company must be proved either expressly or by necessary implication from facts to be submitted to a jury: *Young v. Owen Sound Dredge Co.*, 27 A.R. 659; *Montreal Rolling Mills v. Corcoran*, 27 S.C.R. 595; *Dominion Cartridge Co. v. McArthur*, 31 S.C.R. 392. This case, however, was reversed by the Privy Council on the facts in *McArthur v. Dominion Cartridge Co.* (1905) A.C. 72. Such evidence, however, need not be based upon statements of eye witnesses but may be inferred by a jury from the facts submitted to them: *Griffiths v. Hamilton Light & Power Co.*, 6 O.L.R. 296. This is emphasized by the judgment of the Privy Council in *McArthur v. Dominion Cartridge Co.*, *supra*, which reversed the Supreme Court of Canada and restored the verdict of a jury and the judgments of the two lower Courts upholding it. The plaintiff there sued for damages caused by an explosion, and, judgment having been given in his favor, the Supreme Court reversed it on the ground that there was no exact proof of the fault which certainly caused the injury. The Privy Council however, thought that while proof to that effect may reasonably be required in particular cases, it is not so where the accident is the work of a moment and its origin and course incapable of being detected.

In cases where expert evidence is employed and is necessary and all the expert evidence is in favor of the defendants, a jury

would not be justified in bringing in a verdict in favor of the plaintiff contrary to the evidence so given: *Jackson v. Grand Trunk R.W. Co.*, 2 Can. Ry. Cas. 141, and 156, but where there is expert evidence both ways and it is a question of credibility it is for the jury to judge, looking at the evidence as a whole, which side is to be blamed. See remarks of Osler, J. A., *Glasgow v. Toronto Paper Co.*, 5 O.W.R. 104, at pages 107 and 108.

Res Ipsa Loquitur. In some cases the maxim *res ipsa loquitur* is invoked in order to raise a presumption of negligence from the mere happening of the act complained of, as where, while plaintiff was walking along the street in front of a flour dealer's premises, he was injured by a barrel of flour falling from the upper window. In such a case the mere fact of the accident without proof of anything more, was evidence of negligence proper to go to the jury: *Byrne v. Boadle*, 33 L.J. Ex. 13. Where a brick fell out of a railway bridge which the defendants were bound to maintain and injured a passer-by, shortly after a train had passed, the maxim was invoked and the plaintiff recovered: *Kearney v. London, etc., R.W. Co.*, L.R. 5 Q.B. 411, 6 Q.B. 759; and so where a coach was overturned it was held that the plaintiff had done enough in giving proof of the accident and that the defendant must rebut the presumption of negligence arising from the circumstances: *Christie v. Griggs*, 2 Camp. 79. In all such cases, however, the presumption arising from the accident is not conclusive of negligence but may be rebutted: *Bird v. Great Northern R.W. Co.*, 28 L.J. Ex. 3; *Sington on Negligence* 120.

Res Gestae. In *Armstrong v. Canada Atlantic R.W. Co.*, 1 Can. Ry. Cas. 444, a statement made by the deceased at the time of the accident and shortly before his death, was admitted in evidence to explain the accident. The general subject of admitting statements made at the time of an accident is discussed in the notes to that case, 1 Can. Ry. Cas. 448. In *Ohio, etc., R.W. Co., v. Stein*, 19 L.R.A. 733, the evidence of statements made to the injured man by the engineer at the time of the accident was admitted as evidence and treated as being part of the *res gestae* and not merely hearsay evidence.

The case of *Armstrong v. Canada Atlantic R.W. Co.*, was over-ruled on other grounds by the Court of Appeal, 2 Can. Ry. Cas. 339, but this point was not touched upon. In *Henry v. Grand Trunk R.W. Co.*, 4 O.W.R. 23, the subject was con-

sidered by MacMahon, J., who in the case of an accident at a station which resulted in the death of the plaintiff's husband was asked to admit evidence of statements made by the deceased after the accident and before his death to the effect that the defendant's station agent was to blame, and also evidence that, this being said in the presence of the agent, he did not deny it. It was decided, however, that such statements were made too long after the accident to be treated as part of *res gestae*.

Subsequent Change of Premises. After an accident has occurred attempts have sometimes been made to give evidence showing a subsequent change of premises in support of a theory that the premises were previously defective. It has been held, however, that the mere fact that after an accident the owner of the premises has made changes which he considers will be an improvement, is not evidence that the premises were previously defective and should not be admitted or allowed for consideration by a jury: *Hart v. Lancashire, etc., R.W. Co.*, 21 L.T.N.S. 261; *Cole v. Canadian Pacific R.W. Co.*, 19 P.R. 105; *Pudsey v. Dominion Atlantic R.W. Co.*, 27 N.S.R. 498.

Contributory Negligence. Bowen, L.J., in *Thomas v. Quartermaine*, 18 Q.B.D. at page 694 defines contributory negligence as follows: "Contributory negligence on the part of an owner only means that he, himself, has contributed to the accident in such a sense as to render the defendant's breach of duty no longer its proximate cause." The subject is discussed at length in *Sington on Negligence*, pages 122 to 132, where various definitions of contributory negligence are given. The effect of contributory negligence at common law is to deprive the plaintiff of all right of action: *Phillips v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 399. But the rule in Admiralty in England is in such cases to divide the damages, making the defendant therefore liable for only half the damages caused by him: *Sington*, page 124; *The Bernina*, 13 A.C. 1; and the same rule exists in Quebec in actions under the civil code: *Canadian Pacific R.W. Co. v. Boisseau*, 2 Can. Ry. Cas. 335, at p. 337.

The general topic of contributory negligence has been recently much discussed in the cases of *Rowan v. Toronto R.W. Co.*, 29 S.C.R. 717; *Inglis v. Halifax, etc., R.W. Co.*, 1 Can. Ry. Cas. 352 and 360; *Danger v. London Street R.W. Co.*, 30 O.R. 493; *Brown v. London Street R.W. Co.*, 1 Can. Ry. Cas.

385 and 390; *Phillips v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 399; *Balfour v. Toronto R.W. Co.*, 2 Can. Ry. Cas. 314, 325 and 330; *Moyer v. Grand Trunk R.W. Co.*, 3 Can. Ry. Cas. 1. As these cases turn very much upon their individual facts no specific rule can be well laid down in regard to them.

Infants. The rule as to contributory negligence cannot usually be invoked in the case of infants as it has been held, in most cases, that an infant cannot be expected to exercise the same degree of care as an adult and can therefore recover in cases where if the same accident had happened to an adult under similar circumstances, the latter would be without a right of action: *Farrell v. Grand Trunk R.W. Co.*, 2 Can. Ry. Cas. 249, and notes; *Cummings v. Darngavil Coal Co.*, 5 F. (Ct. of Sess.) 513; *Sullivan v. Creed* (1904), 2 Ir. 317; *Tabb v. Grand Trunk R.W. Co.*, 4 Can. Ry. Cas. 1; *Potvin v. Canadian Pacific R.W. Co.*, *ib.* 8; and see the later notes on this subject in 4 Can. Ry. Cas. 11.

Disobedience to Orders. Where a workman has been injured owing to disobedience to orders which if carried out would have averted the accident he is guilty of contributory negligence and cannot recover: *Holden v. Grand Trunk R.W. Co.*, 2 Can. Ry. Cas. 352; and so if the workman disobeys the rules of his employers and is injured, he has no right of action: *Coutlee v. Grand Trunk R.W. Co.*, Q.R. 23 S.C. 242, 4 Can. Ry. Cas. 36; *Deyo v. Kingston & Pembroke R.W. Co.*, 4 Can. Ry. Cas. 42; and where precautions are prescribed for a workman's safety of which he does not avail himself he cannot recover if an injury thereby happens to him: *Randall v. Ottawa Electric Co.*, 6 O.L.R. 619, which was a case where the plaintiff, a line man, did not use rubber gloves in accordance with his employer's rules. The decision was, however, reversed by the Supreme Court in *Randall v. Ahearn*, 34 S.C.R. 699 on other grounds. Where an electrician who was engaged to put defendant's plant in order and see that everything connected with it was in good shape, was killed owing to a defect which had existed during the whole of his engagement his representatives were unable to recover as it was his duty to remedy the very defect which caused his death: *Davidson v. Stuart*, 14 Man. L.R. 74, 34 S.C.R. 215. And so, although, an employer's manager in a quarry may know of the dangerous condition of the works, yet if the plaintiff was negligently performing his duties and the

accident was due to that he cannot recover: *Dominion Iron and Steel Co. v. Day*, 36 N.S.R. 113, 34 S.C.R. 387. *Fawcett v. Canadian Pacific R.W. Co.*, 8 B.C.R. 393, 32 S.C.R. 721, is another instance of a plaintiff failing to recover because of his disobedience to the master's rules.

Functions of Judge and Jury. In *Cameron v. Douglas*, 3 O.W.R. 817, it was said by Britton, J., that where the evidence was undisputed that the deceased knew of the danger he was incurring, there was nothing to submit to a jury and a non-suit must be granted even though the jury found that the deceased did not know or realize the risk he was undertaking. But the mere fact that the deceased must have known and appreciated the risk will not relieve the defendants if the jury is satisfied that he did not freely agree to accept it: *Williams v. Birmingham, etc., R.W. Co.* (1899), 2 Q.B. 338; *Smith v. Baker* (1891), A.C. 325.

The following general principles on this subject are suggested:

1. The judge must decide as a question of law whether the facts disclose any evidence of negligence proper to submit to a jury: *Cotton v. Wood*, 8 C.B.N.S. 568; *Hammack v. White*, 11 C.B.N.S. 588; *Drury v. North Eastern R.W. Co.* (1901) 2 K.B. 322; *Lundy v. Dawson*, 3 O.W.R. 720; *Brown v. Watrous* 3 O.W.R. 943.

2. Where, however, there is such evidence, the question is purely one for the Jury and their finding will not be reversed merely because a judge may take a different view of the evidence: *Bridges v. North London R.W. Co.*, L.R. 6 Q.B. 377, 7 H.L. 213; *Smith v. South Eastern R.W. Co.* (1896) 1 Q.B. 178; *McArthur v. Dominion Cartridge Co.* (1905) A.C. 72, and a new trial will not be granted unless there is some misdirection or want of direction: *Henry v. Hamilton Brass Co.*, 3 O.W.R. 448; *Webb v. Canadian General Electric Co.*, 2 O.W.R. 865, 3 O.W.R. 853; *Sault Ste. Marie Pulp Co. v. Myers*, 33 S.C.R. 23. An Appellate Court will not generally reverse the finding of a jury on the question of facts unless those findings are so erroneous as to shock a reasonable mind: *Titus v. Colville*, 18 S.C.R. 709; *The Reliance v. Conwell*, 31 S.C.R. 653; *Granby v. Ménard* *Ibid*, 14, and *McArthur v. Dominion Cartridge Co.*, *supra*.

3. If there are no facts which would justify a jury in finding a verdict in favour of plaintiff, and they appear to be carried away by sympathy so as to render a verdict contrary to the facts, their finding may be set aside as perverse and the action dismissed: *Hodson v. Toronto, etc., R.W. Co.*, 3 Can. Ry. Cas. 289. But the disapproval of a judge who tried the case is not in itself sufficient ground to justify the verdict being set aside: *Grieve v. Molsons Bank*, 8 O.R. 162, at pages 168 & 169.

4. If it is clear from the plaintiff's testimony that he might by the exercise of reasonable care have avoided the accident, and there is no evidence to the contrary, then it would appear that the judge should withdraw the case from the jury and grant a non-suit: *Davey v. London, etc., R.W. Co.*, 11 Q.B.D. 213, 12 Q.B.D. 70; *Coyle v. Great Northern R.W. Co.*, 20 L.R. Ir. 409; *Phillips v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 399; *O'Hearn v. Port Arthur*, 2 Can. Ry. Cas. 173.

5. But where the facts, or proper inferences from the facts, are in dispute the question of contributory negligence is for the jury: *Morrow v. Canadian Pacific R.W. Co.*, 21 A.R. 149; *White v. Barry R.W. Co.*, 15 Times L.R. 474; *Vallee v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 338.

6. In *Brown v. London Street R.W. Co.*, 1 Can. Ry. Cas. 385, it was said that the proper question to submit to a jury on the subject of contributory negligence is "Could the plaintiff by the exercise of reasonable care have avoided the injury?" and, in order to provide for an affirmative answer, to put the further question "If so, in what respect do you think the plaintiff omitted to take reasonable care?"

Damages for Personal Injuries.

General Rule. In *Phillips v. South Western R.W. Co.*, 4 Q.B.D. 406, Cockburn, C. J., states the general rule as follows: "Generally speaking we agree with the rule laid down by Brett, J., in *Rowley v. London, etc., R.W. Co.*, L.R. 8 Ex. 231, an action brought on the 9 & 10 Vict. cap. 93, that a jury in these cases must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case and give what they consider under all circumstances a fair compensation." "These are the bodily injury, sustained, the pain undergone, the effect on the

health of the sufferer according to its degree and its probable duration as likely to be temporary or permanent, expenses incidental to attempts to effect a cure or to lessen the amount of the injury; the pecuniary loss sustained through inability to attend to a profession or business as to which again the injury may be of a temporary character or may be such as to incapacitate the party for the remainder of his life." This quotation has been adopted in a number of cases including: *Johnston v. Great Western R.W. Co.* (1904) 2 K.B. 250, where it was laid down in accordance with the decision in *Rowley v. London, etc., R.W. Co.*, L.R. 8 Ex. 231, that in awarding damages for a prospective loss of income from professional or other earnings a jury was not to give such a sum as if invested would produce the full amount of income which he would probably have earned but ought, in estimating the damages, to take into account the circumstances of life and other matters and to give the plaintiff what they considered under all circumstances a fair compensation for his loss. In *Central Vermont R.W. Co. v. Franchère*, 35 S.C.R. 68, these cases are discussed by Nesbitt, J., at pages 75, 76 and 77, and the above decisions followed by him.

The decision in *Phillips v. London & South Western R.W. Co.* was affirmed, 5 Q.B.D. 78. In *Davidson v. Stuart*, 14 Man. L.R. 74, where the deceased was killed by an electric shock while working in the defendants' electric light works, and the plaintiffs were parents and sisters of the deceased, it was held that under the circumstances set out in that case there was nothing in the evidence to warrant the inference of a reasonable expectation of any pecuniary benefit to the plaintiffs from a continuance of the life of the deceased, and the verdict of the jury in favor of the plaintiffs was on that ground set aside, and it is stated by Killam, C. J., at page 81, that damages are not to be allowed for injury to the feelings of the sufferers but for the loss of a life of substantial or pecuniary benefit to the relatives entitled under the statute. The cases on the subject are later discussed in that decision, which was affirmed on other grounds by the Supreme Court in *Davidson v. Stuart*, 34 S.C.R. 215. In *Central Vermont R.W. Co., v. Franchère*, *supra*, Mr. Justice Nesbitt concurs with the rules laid down by Killam, C.J., in the *Davidson Case*. At common law the personal representative of the deceased person could not recover damages for his death, but by the various statutes set out in 2

Can. Ry. Cas. 18, 19, and 21, this rule has been greatly modified. Under the existing statutes, damages which may be recovered are looked upon as distinct from those which the deceased might have had if he had survived his injuries; so much so, that though the personal representative may sue on behalf of persons named in the statute, yet if there are no such persons living, or if they die before judgment is obtained, no damages can be recovered: *McHugh v. Grand Trunk R.W. Co.*, 2 Can. Ry. Cas. 7. Under the Manitoba Statute, R.S.M. cap. 26, no person can bring an action but the person named in that statute, *i.e.*, the executor: *Pearson v. Canadian Pacific R.W. Co.*, 12 Man. L.R. 112. In addition to the cases already mentioned, the case of *Runciman v. Star Steamship Line*, 35 N.B.R. 123, confirms the general rule already laid down, and therefore damages cannot be recovered for the death of a child or a son not earning anything unless there is some reasonable expectation of pecuniary benefit to the parent in the future capable of being estimated: *Green v. New York, etc., R.W. Co.*, 27 A.R. 32; *Mason v. Bertram*, 18 O.R. 1. There need not, however, in such an action be evidence of actual pecuniary benefit received from the deceased if there is a reasonable expectation of benefit: *Rombough v. Balch*, 27 A.R. 32. In estimating the value of the life of the deceased, although reference may perhaps be made in the evidence to the current tables of mortality used by insurance offices: *Camden v. Williams*, 11 Am. & Eng. Ry. Cas. (N.S.) 600, yet, as already stated in *Johnston v. Great Western R.W. Co.* (1904), 2 K.B. 250, a jury should not award a sum sufficient to give the plaintiff an annuity equal to the income which he would have earned had it not been for the accident. Damages to the estate of the deceased, for medical attendance, loss to business, mourning or funeral expenses, cannot be recovered: *McDonald v. The King*, 2 Can. Ry. Cas. 1; *Dalton v. South Eastern R.W. Co.*, 4 C.B.N.S. 296. Nor will damages be allowed to the plaintiffs for mental suffering or loss of the deceased's society: *Canadian Pacific R.W. Co. v. Robinson*, Mont. L.R. 2 Q.B. 25, 14 S.C.R. 105.

It is not open to the defendants to seek to reduce damages recoverable by the plaintiffs by the amount of insurance moneys which they may have received on account of the death of the deceased: *Beckett v. Grand Trunk R.W. Co.*, 13 A.R. 174; *Grand Trunk R.W. Co. v. Beckett*, 16 S.C.R. 713; but in *Grand*

Trunk R.W. Co. v. Jennings, 13 A.C. 800, affirming *Jennings v. Grand Trunk R.W. Co.*, 15 A.R. 477, it was said by Lord Watson that while the amount of insurance received by the widow should not be taken into account, nevertheless the pecuniary benefit which accrued to her from her husband's premature death, consisting in the accelerated receipt of a sum of money, might be taken into consideration, and that in such a case the extent of the benefit might fairly be taken to be represented by the use or interest of that money during the period of acceleration, and that a jury might deduct from their estimate of the future earnings of the deceased the amount of premiums which, if he had lived, he would have had to pay out of his earnings for the maintenance of the policy.

Apportionment of Damages. The apportionment of damages between those relatives who are entitled within the terms of the statute, is done at the trial by the jury, if there is one, and if there is no jury, by the trial judge: *Burkholder v. Grand Trunk R.W. Co.*, 3 Can. Ry. Cas. 5; which will illustrate the method adopted in making an apportionment and the considerations which influenced the Court. See also *Speers v. Grand Trunk R.W. Co.*, 3 O.W.R. 69, 4 O.W.R. 490.

Inadequacy of Damages. Generally speaking, as mentioned before, the verdict of a jury will not be disturbed on the ground that the damages are inadequate, any more than it will be disturbed because of their being too large. In *Phillips v. London, etc., R.W. Co.*, 4 Q.B.D. 406, already quoted, Cockburn, C.J., after setting out the various grounds upon which the damages may be allowed, says:—"If a jury have taken all these elements of damage into consideration, and have awarded what they deemed to be a fair and reasonable compensation under all the circumstances of the case, a court ought not, unless under very exceptional circumstances, disturb their verdict. But looking at the figures in the present case, it seems to us that the jury must have omitted to take into account some of the heads of damage which were properly involved in the plaintiff's claim." See these remarks quoted in *Johnson v. Great Western R.W. Co.* (1904), 2 K.B. 250, at page 256. In *Church v. Ottawa*, 25 O.R. 298, 22 A.R. 348, a verdict was set aside on the ground that the amount awarded was so small that it was evident that the jury must have overlooked some material element of damage in

the plaintiff's case. In that case the plaintiff, who was a practising physician, earning a large income, had suffered to a considerable extent in his business, and the jury only allowed \$700, and therefore a new trial was granted. Unless it clearly appears to the Court that the smallness of the damages has arisen from a mistake on the part of either the Court or the jury, or from some unfair practice on the part of the defendant, a verdict will not be set aside, and the mere fact that it may be considered a compromised verdict, will not be sufficient ground for upsetting it, if it can be justified upon any hypothesis presented by the evidence: *Currie v. St. John R.W. Co.*, 3 Can. Ry. Cas. 280.

Damages for Nervous Shock. Where a lady sustained personal injuries from a severe shock brought about by a gate-keeper of the defendants negligently inviting her to drive over a level crossing when it was dangerous to do so, and a collision between her carriage and a passing train was narrowly averted, it was held that the injury arose from mere sudden terror, without any physical injury, and that the fact of the nervous or mental shock caused by fright in seeing the train so close upon her was not a consequence which, in the ordinary course of things, could be attributed to the negligence of the gate-keeper, and therefore the damages were too remote: *Victorian Railway Commrs. v. Coultas*, 13 A.C. 222. This case has been doubted in England in *Pugh v. London, etc., R.W. Co.* (1896), 2 Q.B. 248; *Wilkinson v. Downton* (1897), 2 Q.B. 57; but in *Dulieu v. White* (1901), 2 K.B. 669, the principle of the case seems to have been affirmed, although the judges, who were not bound to follow it as it was decided in the Privy Council, reached a similar result by different methods. All these cases are discussed in Sington on Negligence, pages 35, *et seq.*, and the learned author appears there to consider the decision of the Privy Council open to question. It may be pointed out that the case is in any event binding upon the Courts of the colonies, and so it was followed by the Court of Appeal for Ontario in *Henderson v. Canada Atlantic R.W. Co.*, 25 A.R. 437, affirmed 29 S.C.R. 632; and in *Filiatrault v. Canadian Pacific R.W. Co.*, Q.R. 18 S.C. 491, it was held that damages for nervous shock caused to one of the family by her mother's death, being conjectural, indirect and remote, could not be recovered.

Trains.

- Train
equip-
ment to
be pro-
vided.
Communi-
cation
with
engine
driver.
211. Every company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means:
- (a.) to provide immediate communication between the conductor while in any car of any passenger train, and the engine driver;
- Brakes.
- (b.) to check at will the speed of the train, and bring the same safely to a standstill, as expeditiously as possible, and, except under circumstances of sudden danger or emergency, without causing undue discomfort to passengers, if any, on the train, including a power drive wheel brake and appliances for operating the train brake system upon the locomotive, and having a sufficient number of cars in every train so equipped with power or train brakes so that the engineer on the locomotive drawing such train can control its speed, or bring it to a stop in the quickest and best manner possible without requiring brakemen to use the common hand-brake for that purpose; and on all trains carrying passengers such system of brakes shall comply with the following requirements:—
- On trains
carrying
passen-
gers the
brakes
must—
- (i.) The brakes shall be continuous and must be instantaneous in action, and capable of being applied at will by the engine driver or any brakeman;
- Be self-
applying
in case of
accident.
- (ii.) The brake must be self-applying in the event of any failure in the continuity of its action;
- Couplers.
- (c.) To securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars;

Provided that the company shall not be obliged to equip all trains with a power drive wheel brake or air brakes as provided in paragraph (b) of this sub-section, nor to equip its cars with automatic couplers as provided in paragraph (c) of this sub-section, before the first day of January, 1906.

2. All box freight cars of the company built after the passing of this Act, shall be equipped with the following attachments for the security of railway employees:—

(a.) Outside ladders, on two of the diagonally opposite ends and sides of each car, projecting below the frame of the car, with one step or rung of the ladder below the frame, the ladders being placed close to the ends and sides to which they are attached;

(b.) Hand grips placed anglewise over the ladders of each box car and so arranged as to assist persons in climbing on the roof by means of the ladder.

All cars built prior to the passing of this Act shall be fitted with such attachments before the first day of January, 1906; provided that, if there is at any time any other improved side attachment which, in the opinion of the Board, is better calculated to promote the safety of the train hands, then the Board may require any of such cars not already fitted with the side attachments first mentioned, to be fitted with the said improved attachment.

3. Every company shall adopt and use upon all its rolling stock such height of draw-bars as the Board determines in accordance with any standard from time to time adopted by competent railway authorities.

This sub-section is taken from sec. 243 of the Act of 1888, but is greatly amended. Similar provisions relating to communications with engines are contained in sec. 3 of Schedule B of the recommendations to the Board of Trade to be found in Brown

and Theobald, page 44. Those relating to brakes in sec. 34, Schedule B, and in 41 Viet. cap. 20 (Imp.), Brown and Theobald, pages 42 and 737. Very similar legislation exists in the United States under the Safety Appliances Acts, 1893 and 1903 (29 Statutes at Large, 85 and 32 Statutes at Large).

Changes. Section 243 began "Every railway company *which runs trains upon the railway for the conveyance of passengers* shall provide and cause to be used in and upon such trains," etc. The section now reads: "Every company shall provide and cause to be used on all trains." The earlier section, therefore, made provision only for passenger trains, although in *Miller v. Grand Trunk R.W. Co.*, 2 Can. Ry. Cas. 449, 490, 3 Can. Ry. Cas. 147, a case of an accident upon a freight train, the section was discussed as though it applied to freight trains as well. All doubt upon the matter is now set at rest by the new section which applies to all trains except as regards communication between the engine driver and conductor, which applies only to passenger trains.

The former section also referred only to (a) Communication between conductor and engine driver; (b) Means of applying brakes by the power of the steam engine at the will of the engine driver; (c) Automatic couplers; and (d) Apparatus for securely fixing seats. The new section deals with (a) Communication between engine driver and conductor; (b) A proper system of brakes; (c) A proper system of couplers; (d) The equipment of freight cars with outside ladders and hand grips; and (e) The proper height of draw bars. While, therefore, a number of new appliances are provided for the question of securing the seats is omitted.

Brakes. A collision was caused by defective brakes whereby a switchman was killed, the defect was due to the negligence of a fellow servant in not tightening a nut sufficiently; it was held that the plaintiff could not recover because the brakes used were sufficient and the defect was due to the negligence of a fellow-servant: *Plant v. Grand Trunk R.W. Co.*, 27 U.C.R. 78. *Quare*, whether this decision would now be followed: *Markle v. Donaldson*, 7 O.L.R. 376; *Grant v. Acadia Coal Co.*, 32 S.C.R. 427; *Schwoob v. Michigan Central R.W. Co.*, 5 O.W.R. 157.

Where a crack had existed in a brake-wheel on a hand brake at the top of a car for some weeks, and after the accident the

wheel was found to be gone from the brake-mast and the deceased was found under a car, but no other explanation was given of the accident, the plaintiffs failed to recover because it was said that the cause of the accident was mere conjecture and that under the evidence it was the duty of the deceased to have discovered the defect and to have reported it, and having failed to do so, he was guilty of contributory negligence, and his representatives could not recover: *Badgerow v. Grand Trunk R.W. Co.*, 19 O.R. 191; and in *Fawcett v. Canadian Pacific R.W. Co.*, 8 B.C.R. 393; 32 S.C.R. 721, the plaintiff was also unable to recover because it was the duty of the brakeman to have discovered the defect which the plaintiff alleged caused the accident. The statute now requires under certain conditions that when brakes shall be employed the latest invention should be used, but the question has sometimes arisen how far a railway company is bound to employ the latest devices for the safety of its employees or passengers. In *Black v. Ontario Wheel Co.*, 19 O.R. 578, it is laid down that those using dangerous machinery must see that it is reasonably safe and that the appliances are such as are in use by prudent persons, but that they are not necessarily bound to use the very latest changes and improvements: see also *Butler v. Birnbaum*, 7 T.L.R. 287, Elliott on Railways, vol. 3, pages 2007 and 2058; but it is the duty of a railway company to employ whatever system is in general use and is supposed to be the best system even if not the latest, and as applied to brakes this duty is not confined to passengers, but applies also for the benefit of persons lawfully crossing the railway tracks: *Smith v. New York, etc., R.W. Co.*, 19 N.Y. 127; *Gagg v. Vetter*, 41 Ind. 228. In England it has been held that a company is not liable for defects in the brake of a borrowed car where the company borrowing it has used all reasonable precautions to see that it is safe: *Caledonian R.W. Co. v. Mullholland* (1898), A.C. 216, but if the defect exists in direct breach of the statute the company who borrowed the car would probably be liable: *Atcheson v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 490. If air brakes are not applied a sufficient distance from the crossing to permit the efficient application of hand brakes in the case of the air brakes failing to work, the company may be guilty of negligence and liable for injuries to persons injured: *Great Western R.W. Co. v. Brown*, 3 S.C.R. 159. Where a car has been left with the brakes set so that it will not move, but the brakes

were loosened by trespassers, and the car got upon the highway and caused injury to another, it was held that the railway company was not liable: *McDowell v. Great Western R.W. Co.* (1903), 2 K.B. 331.

Where sand pipes which are used in conjunction with the brakes for assisting to stop the driving wheels of an engine in the case of slippery rails were absent, it was held that this could not be looked upon as the absence of proper appliances where the train was going backwards and it was usual to so place them that they would assist in stopping the train only when moving forward: *Moennie v. Tillsonburg, etc., R.W. Co.*, 5 O.W.R. 69. The absence of a sander or sand-pipe is also discussed in *Miller v. Grand Trunk R.W. Co.*, 2 Can. Ry. Cas. 449 and 490; *Grand Trunk R.W. Co. v. Miller*, 3 Can. Ry. Cas. 147. On this point see also judgment of Killam, J., in *Central Vermont R.W. Co. v. Franchère*, 35 S.C.R., at pages 77 and 79.

Coupling Cars. In spite of the general rule laid down in *Shadford v. Ann Arbor Street R.W. Co.*, 6 Am. & Eng. Ry. Cas. (N.S.) 584, that appliances that are ordinarily and generally used are all that a master is required to use, and that his failure to furnish the safest appliances known does not render him guilty of negligence, it was held in North Carolina in *Troxler v. Southern R.W. Co.*, 14 Am. & Eng. Ry. Cas. 711, that where a railway employee is injured where there are not proper appliances, he is entitled to recover damages because of the failure of the company to equip its freight cars with modern self-coupling devices, which in the opinion of that Court is negligence *per se*. It is very doubtful whether the reasoning in this case would be accepted in other Courts except in cases where the use of automatic couplings has become obligatory by statute.

Where the plaintiff was engaged in coupling the old-fashioned link and pin coupler under the specific orders of his superior officer and the engine was negligently managed, it was held that he was entitled to recover: *Weegar v. Grand Trunk R.W. Co.*, 23 O.R. 436, 20 A.R. 528; *Grand Trunk R.W. Co. v. Weegar*, 23 S.C.R. 422.

In *Fraser v. Algoma Central R.W. Co.*, 3 O.W.R. 104, the plaintiff was putting together freight cars in a yard and was injured as he alleged by a defective coupler which had become and remained out of order owing to defendants' negligence. The

coupler itself was of an approved kind, but the jury found that it became defective through the breaking of a link in the chain by means of which the lever was operated. The jury found the defendants guilty of negligence in having a broken link in the coupler attachment, and that there was no proper inspection within a reasonable time before the accident. Judgment was given for the plaintiff, and the judgment was affirmed by a Court of Appeal (Osler and MacLennan, JJ.A., dissenting).

Where the deceased was engaged in coupling cars and was found killed, but no one saw the accident, the theory being that a load of lumber on a car which he was coupling had shifted during the operation, striking him on the head, it was held that the plaintiffs could not recover as the cause of death was mere conjecture: *Farmer v. Grand Trunk R.W. Co.*, 21 O.R. 299.

Where car buffers in street cars were of different kinds so that in coupling the cars the buffers overlapped and formed no protection for the person making the coupling, it was held to be a defect under the Workman's Compensation Act, and the company were liable to a person who had been injured: *Bond v. Toronto R.W. Co.*, 22 A.R. 78; 24 S.C.R. 715. Couplers which have become worn out, and on that account are not proper within the terms of the statute, may in the case of an injury resulting from such defect, be a sufficient cause of action: *Voelker v. Chicago, etc., R.W. Co.*, 116 Fed. R. 867. The subject of automatic couplers is fully discussed in this case.

This case was quoted and the corresponding statute fully discussed in *Johnson v. Southern Pacific R.W. Co.*, 25 Sup. Ct. Reporter 158. Johnson, who was employed by the railway company, was injured while trying to couple a locomotive to a dining car. He brought an action against the railway company for damages under the Federal Statute which requires cars engaged in interstate commerce to be equipped with automatic couplers. Judgment was given against him in the lower Courts, but the Supreme Court found in his favor.

The three main points decided by the case are said to be, first, that automatic couplers of different types of construction must, in order to comply with the law, couple with any other coupler as well as with couplers of their own type; second, that a car engaged in interstate commerce traffic need not necessarily be in motion to bring it within the provisions of the law, but it is

as much subject thereto in standing on a siding as when on a main track; and, third, that locomotives as well as other rolling stock must be equipped.

Tail Lights. The absence of tail lights on a train moving backwards may be evidence of negligence sufficient to justify a verdict in favor of the plaintiff: *Canadian Pacific R.W. Co. v. Boisseau*, 2 Can. Ry. Cas. 335; and where the light in front of a street car passing along a street on a dark night was dim, this was admitted as sufficient to warrant the plaintiff in claiming that the defendants were negligent: *Ford v. Metropolitan R.W. Co.*, 2 Can. Ry. Cas. 187.

The fact of leaving a switch near a highway, neither locked nor guarded so that it could be shifted by trespassers or strangers is evidence of negligence: *Green v. Ottawa and New York R.W. Co.*, 27 A.R. 32.

Penalty
for non-
compli-
ance.

Damages.

Agree-
ments to
contrary
invalid.

Consent
to
prosecu-
tion.

4. Every company which fails to comply with any of the provisions of this section, shall forfeit to His Majesty, a sum not exceeding two hundred dollars, for every day during which such default continues, and shall, as well, be liable to pay to all such persons as are injured by reason of the non-compliance with these provisions, or to their representatives, such damages as they are legally entitled to, notwithstanding any agreement to the contrary with regard to any such person, unless such agreement is conformable to the law of the province in which it is made and is authorized by regulation of the Board: Provided however that no proceedings shall be instituted to enforce or recover any forfeiture to His Majesty hereunder without the consent of the Board first obtained. Sub. for 51 V., c. 29, s. 243, Am.

Penalties for Non-compliance. Not content with the general remedies and penalties provided by sec. 294 *post* for a breach of the statute an express provision for penalties and for an action for damages resulting from a breach of the statute is provided for by this section, and the additional term inserted that persons injured or their representatives may recover "such damages as they are legally entitled to notwithstanding any agree-

ment to the contrary with regard to any such person unless such agreement is conformable to the law of the province in which it is made and is authorized by regulation of the Board."

Release of Liability in Quebec. The words quoted "Unless such agreement is conformable to the law of the province in which it is made and is authorized by regulation of the Board" are new, the other words appeared in sec. 243 of the Act of 1888 and received much consideration in the cases of *Ferguson v. Grand Trunk R.W. Co.*, 2 Can. Ry. Cas. 420; *Miller v. Grand Trunk R.W. Co.*, *ib.* 449 and 490, and *Grand Trunk R.W. Co. v. Miller*, 3 Can. Ry. Cas. 147. It would appear from the judgments of Doherty and Lemieux, JJ., in the *Ferguson case*, reported pp. 430 and 433, and of Curran, Pagnuelo and Bossé, JJ., in the *Miller case*, reported pp. 458, 465, and 494, that while a workman may contract himself out of his right of action for the negligence of a fellow employee, a similar contract respecting the negligence of the master in failing to provide proper appliances or otherwise would be invalid, because as put by Bossé, J., in his judgment, it would be in effect to agree in advance for freedom from responsibility for one's wrong-doing, and he states that such an agreement would be contrary to the civil law. In the Supreme Court, it was held that under the facts before the Court there was no breach of the section in question and that failure to remedy the defects complained of in that case was merely the negligence of an employee and not negligence attributable to the company and, therefore, the company might validly contract with its employees so as to exonerate itself from liability for such negligence, and such a contract would be an answer to an action under article 1056 of the Civil Code of Lower Canada. It would appear, therefore, that according to the law of Quebec there are certain kinds of negligence for which a person injured cannot by a previous contract relieve the person guilty of negligence from liability, and the words "Unless such agreement is conformable to the law of the province in which it is made" were probably inserted to prevent any interference with the rules of the civil law in force in Quebec upon this subject. The remarks of Mr. Justice Girouard in his dissenting judgment in the *Miller case*, 3 Can. Ry. Cas., at p. 163, serve to explain the intention of these words: "Our attention has been called to the last words of sec. 243 of the Railway Act, 1888, which gives an action in certain cases of negligence notwith-

standing any agreement to the contrary with regard to any such person. If I understand these words correctly they simply mean that the company may protect itself against certain acts of negligence not mentioned in the clause in the provinces where such an agreement can be made. But they cannot possibly mean to legalize what would be contrary to law in any province." The addition in the Act of 1903 was probably inserted to carry out the view expressed by the learned Judge whose opinion has been just quoted. In the important case of *The Queen v. Grenier*, 2 Can. Ry. Cas. 409, which was an appeal from the Exchequer Court of Canada in an action arising in the Province of Quebec, it is laid down by Sir Henry Strong, C.J., at p. 416, that a workman may so contract with his employer as to exonerate the latter from liability for negligence for which the former would otherwise be entitled to recover damages, that such a contract would be a sufficient answer under Lord Campbell's Act, and that the action given by Art. 1056 of the Civil Code of Lower Canada is merely an embodiment in the Code of an earlier statute re-enacting Lord Campbell's Act, and that therefore the deceased by renouncing his claims against the Crown waived all right for either himself or his personal representatives to sue in respect of a cause of action which he had released. If this is to be accepted as a final statement of the law in the Province of Quebec, then there does not seem to be much difference between it and the law in the other provinces on the subject, but, as will be seen from a perusal of the judgments in the *Ferguson* and *Miller cases*, some of the judges, notwithstanding it, draw a distinction between accidents due to the negligence of the employer and accidents due to the negligence of the employer's servants. For other cases in Quebec on this subject see *Roach v. Grand Trunk R.W. Co.*, Q.R. 4 S.C. 392; *Bourgeault v. Grand Trunk R.W. Co.*, Mont. L.R. 5 S.C. 249; *Brassell v. Grand Trunk R.W. Co.*, Q.R. 11 S.C. 150; *Glengoil Steamship Co. v. Pilkington*, 28 S.C.R. 146, and *Robinson v. Canadian Pacific R.W. Co.* (1892), A.C. 481. As mentioned in the notes on this subject in 2 Can. Ry. Cas., pp. 501 *et seq.*, the question whether the negligence of the employer is "slight" or "gross" is an element in determining whether a contract for the release of liability is valid or not.

Release under the English Law. The general English rule is summed up in the maxim "*Quivis renunciare, potest juri pro se introducto*," and under this rule anyone may, by agreement not contrary to public policy, waive the benefit of any provision of the law existing in his favour: *Griffiths v. Earl Dudley*, L.R. 9 Q.B.D. 357, and this case was followed and applied by our Supreme Court in *The Queen v. Grenier*, 2 Can. Ry. Cas. 409, where, as mentioned above, it was laid down that such a previous renunciation of his rights will bind not only the employee or person making the contract, but also in the event of his death, those of his personal representatives who might otherwise have been entitled to sue for damages under Lord Campbell's Act. In *Harris v. Grand Trunk R.W. Co.*, 3 Can. Ry. Cas. 172, and in the case of *Holden v. Grand Trunk R.W. Co.* (reported on another point only, in 2 O.W.R. 80, 2 Can. Ry. Cas. 352), it has been decided that contracts similar in their terms to those under consideration in the *Grenier*, *Ferguson* and *Miller* cases are valid and binding, and that the plaintiff, therefore, could not recover. This subject is discussed in notes in 2 Can. Ry. Cas., pp. 501, *et seq.*, and 3 Can. Ry. Cas., p. 173. Whether such agreements may be valid or not according to the law of the Province in which they are made, they must in any case be sanctioned by the Board. This is also required under section 275, *post*. in respect to contracts for the carriage of traffic.

It may be pointed out that the interpretation and effect of this clause, and of any such contract, will depend upon the law of the Province where it is made (*lex loci contractus*), so that where such a contract is made in Quebec, and is raised by way of defence to an action brought in Ontario upon a cause of action arising there, the law of the Province of Quebec would have to be proved and applied. Such a question might possibly arise because in the class of cases under consideration, railway employees engaged, for instance, in Montreal, will conceivably in many cases perform the most or all of their work in Ontario.

The following statute was passed by the Dominion of Canada in 1904, and appears on the statute books as 4 Edw. VII., cap. 31. Section 2, however, provides that there must be a reference to the courts to determine its validity, and only after their decision and after proclamation by the Governor in Council is it to take effect. No argument has yet taken place upon the validity of this enactment.

1. Notwithstanding anything in any Act heretofore passed by Parliament, no railway company within the jurisdiction or legislative power or control of Parliament shall be relieved from liability for damages for personal injury to any workman, employee or servant of such company, nor shall any action or suit by such workman, employee or servant, or, in the event of his death, by his personal representatives, against the company, be barred or defeated by reason of any notice, condition, or declaration made or issued by the company, or made or issued by any insurance or provident society or association of railway employees formed, or purporting to be formed, under such Act; or by reason of any rules or by-laws of the company, or rules or by-laws of the society or association; or by reason of the privity of interest or relation established between the company and the society or association, or the contribution or payment of moneys of the company to the funds of the society or association; or by reason of any benefit, compensation or indemnity which the workman, employee or servant, or his personal representatives, may become entitled to or obtain from such society or association, or by membership therein; or by reason of any express or implied acknowledgment, acquittance or release obtained by the company or the society or association prior to the happening of the wrong or injury complained of, or the damage accruing, to the purport or effect of relieving or releasing the company from liability for damages for personal injuries as aforesaid.

2. Upon the passing of this Act, the Governor in Council shall submit to the Supreme Court of Canada for its determination the question of the competency of this Parliament to enact the provisions hereinbefore set forth: and in the event of the said court determining that the said provisions are within the powers of this Parliament, and the time for appeal having elapsed—or in case of appeal being taken and prosecuted, then in the event of it being determined by the Judicial Committee of the Privy Council that the said provisions are within the powers of Parliament as aforesaid—the Governor in Council shall thereupon name a day, by proclamation, for the coming into force of this Act, and this Act shall take effect and come into force upon the day so named accordingly.

212. The Board may, upon application, order that any apparatus or appliance specified in such order shall, when used upon the train in the manner and under circumstances in such order specified, be deemed sufficient compliance with the provisions of the last preceding section, but the Board shall not, by such order, allow any exception to, or modification of, the requirements of such section; but the Board may, by general regulation, or in any particular case, on good cause shown, from time to time extend the period within which such appliances shall be used.

Power of Board respecting train equipment. Limitation upon power. Discretion as to enforcing use of brakes, couplers, etc.

2. The Board shall endeavour to provide for uniformity in the construction of rolling stock to be used upon the railway and for a uniformity of rules for the operation and running of trains; and may make regulations designating the number of men to be employed upon trains, or providing that coal shall be used on all locomotives instead of wood in any district, and generally providing for the protection and safety of the public, of property, and of the employees of the company with respect to the running and operation of trains by the company.

Power to regulate running and operating of trains.

This section is new. It should be read with section 242, *infra*.

213. Every locomotive engine shall be equipped and maintained with a bell of at least thirty pounds weight and with a steam whistle. 51 V., c. 29, s. 244.

Bell and whistle on locomotive.

See notes to section 224, *infra*.

214. The company shall, according to its powers, furnish, at the place of starting, and at the junction of the railway with other railways, and at all stopping places established for such purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway,—and shall furnish adequate and suitable accommodation for the carrying, unloading and delivering of all such traffic,—and shall, without delay, and with due care and diligence, receive, carry and deliver all such traffic, and shall furnish and use all proper appliances, accommodation and means necessary therefor.

Accommodation for passengers and freight at stations.

Train accommodation. Duties respecting transportation

Payment
of tolls.

2. Such traffic shall be taken, carried to and from, and delivered at such places, on the due payment of the toll lawfully payable therefor.

Right of
action on
default.
Condi-
tion
against
negli-
gence
invalid.

3. Every person aggrieved by any neglect or refusal in the premises shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servant.

Accom-
modation
may be
ordered
by Board

4. If in any case such accommodation is not, in the opinion of the Board, furnished by the company, the Board may order the company to furnish the same within such time or during such period as the Board deems expedient, having regard to all proper interests. 51 V., c. 29, s. 246 part, Am.

Chief Changes. The term "traffic" is defined by section 2 (z) to mean and include "passengers, goods, and rolling stock." This word has been substituted for the words "passengers and goods" in section 246 of the Act of 1888.

Section 246 began, "All regular trains shall be started and run as near as practicable at regular hours fixed by public notice." This direction will now be found in section 215, *infra*.

The words "according to its powers" in the first line are new, as are also the words "at the place of starting and at the junction of the railway with other railways and at all stopping places established for such purpose," and the words "adequate and suitable accommodation" are substituted for the words "sufficient accommodation." Numerous other changes will also be noticed on comparing the two sections, and sub-section 4 is entirely new, and gives the Board of Railway Commissioners power to supervise the character of service given and to require changes.

Effect of Section—Railways as Common Carriers. The effect of this section and of other sections of the Act, *in pari materia*, is to make railway companies common carriers of goods, or at least to impose upon them the same duties as those to which by the common law, common carriers are subject: *Grand Trunk*

R.W. Co. v. Vogel, 11 S.C.R. 612; *Dickson v. Great Northern R.W. Co.*, 18 Q.B.D. 176; *McCormack v. Grand Trunk R.W. Co.*, 3 Can. Ry. Cas. 185; and therefore they are bound at common law to carry all goods which they profess to carry upon a reasonable hire being tendered: *Pickford v. Grand Junction R.W. Co.*, 8 M. & W. 372. By the terms of the statute a company must carry all traffic offered "according to its powers," so that if it has power to carry any particular kind of traffic, it must apparently do so no matter what its "professions" may be. To this extent the statute appears to impose a somewhat wider liability upon railway companies than the common law laid upon common carriers, and it has been held that under our Act, as under the English Act, they are common carriers of animals: *Dickson v. Great Northern R.W. Co.*, *supra*. One effect of this statutory obligation is that when in the performance of the obligation imposed upon them by law, they unavoidably create a nuisance, they are not liable therefor: *Bennett v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 451, where it was held that the defendants were not liable for inconvenience caused by a cattle pen necessarily used in the business of forwarding cattle, which they kept as clean as possible. In three particulars, however, railway companies differ from common carriers on account of the provisions of this Act—(1) their right to limit their liability by contract is curtailed; (2) their tolls must be equal; (3) they are by sub-section 4 of this section and by other provisions of the Act, subject to the general supervision of the Board of Railway Commissioners, who may by statute interfere with and regulate their manner of carrying on their business.

Tolls Must be Equal. At common law the hire charged by a carrier must be reasonable: *Baxendale v. Eastern Counties R.W. Co.*, 4 C.B.N.S. 63; but there is no duty to carry the goods of all customers at equal rates, although the fact of charging less to one customer than another is evidence, though not conclusive, that the greater charge is unreasonable: *Baxendale v. Eastern Counties R.W. Co.*, *supra*, and 27 L.J.C.P. 145; *Sutton v. Great Western R.W. Co.*, L.R. 4 H.L. 226; particularly the judgment of Blackburn, J., pp. 236, *et seq.* This and the other English cases were discussed at length in *Scott v. Midland R.W. Co.*, 33 U.C.R. 580. The common law rule has now been altered greatly by statutes and section 252, *infra*, and cognate sections of this Act seek now to prevent discrimination or any other form of unequal tolls.

Control of Board. Sub-section 4 of this section, while new, embodies a principle contained in many statutes affecting railway companies, and in addition to the common law duty to afford proper facilities for transport, permits the Board to regulate these facilities within the limits prescribed by the Act. Section 211, *ante*, and other sections of this statute are all instances of legislative control and regulation of the means of transport.

Liability Discussed. Subject to these remarks, the cases nearly all proceed upon the principles applicable at law to carriers of goods and passengers, and we may now enquire what are the duties of railway companies—(1) as carriers of persons; (2) as carriers of goods for hire; (3) as warehousemen; (4) how far can they limit their common law liability as carriers; (5) who may sue them for a breach of duty; and (6) the measure of damages.

1. *Liability as Carriers of Persons.*

(a) *General Liability.*

The distinction between the liability of carriers of goods and carriers of passengers was laid down at an early date, and before the days of railways, it was said that while carriers of goods were insurers, carriers of passengers were liable only for negligence in the performance of their contract: *White v. Boulton*, 1 Peake 113; and there are numerous English cases emphasizing this distinction. These cases are discussed and collected in *Redhead v. Midland R.W. Co.*, L.R. 2 Q.B. 412, 4 Q.B. 379, which lays down the general principle that “the contract made by a general carrier of passengers for hire, with a passenger, is to take due care (including in that term the use of skill and foresight) to carry the passenger safely; and is not a warranty that the carriage in which he travels shall be in all respects perfect for its purpose, that is to say, free from all defects likely to cause peril, although those defects were such that no skill, care or foresight could have detected them.” See also *Blamires v. Lancashire and Yorkshire R.W. Co.*, L.R. 8 Ex. 283. The liability of railways to passengers was discussed, and the distinction adverted to, drawn in *Sutherland v. Great Western R.W. Co.*, 7 U.C.C.P. 409, where a history of the law and cases on the subject appears, and a further discussion will be found in *Braid v.*

Great Western R.W. Co., 10 U.C.C.P. 137, affirmed 1 Moore's P.C. Reports N.S. 101. This principle was applied to a case in which the plaintiff was properly riding on a freight train and was injured, but was unable to show any negligence on the part of the railway company, and the rule was laid down that a person using a freight train could not expect the same degree of care as one using a passenger train: *Hutchinson v. Canadian Pacific R.W. Co.*, 17 O.R. 347.

Similarly, the Government of Canada is not liable for an accident happening on the Intercolonial Railway owing to a latent defect in an axle which broke during the journey, the onus being on the plaintiff to prove negligence: *Dubé v. The Queen*, 3 Ex. C.R. 147; see also *Badgerow v. Grand Trunk R.W. Co.*, 19 O.R. 191, at p. 195; and the whole subject was considered in *Canadian Pacific R.W. Co. v. Chalifoux*, 22 S.C.R. 721, reversing *Chalifoux v. Canadian Pacific R.W. Co.*, M.L.R. 2 S.C. 171, 3 Q.B. 324, where English, American and Quebec cases are discussed, and the English common law rule was applied to the Province of Quebec. In that case the accident happened through a rail breaking during very cold weather on a part of the track which had been properly patrolled by defendants' section men. The New York case of *McPadden v. New York Central R.W. Co.*, 44 N.Y. 478, was referred to, and the principles there laid down were adopted. In *Quebec Central R.W. Co. v. Lortie*, 22 S.C.R. 336, it was held that a passenger who chooses to get off a train where there is no platform, could not recover for injuries received when he might, by going through a car, have alighted at the station platform. The general principle has been recently affirmed in *East Indian R.W. Co. v. Kalidas* (1901), A.C. 396, in which a man was killed by explosives done up in a parcel and brought into a car by another passenger who was also killed. The railway company did not know what was in this bundle when it was brought in, and, therefore, there was no evidence of negligence on their part. So also a railway company is not liable for injuries caused to a passenger by closing a carriage door on his hand, when they did not know it was there: *Drury v. North Eastern R.W. Co.* (1901), 2 K.B. 322. Where a passenger in an overcrowded car got up to prevent others entering and put his hand in the door-jamb, and the porter, not knowing this, closed the door, thus injuring the passenger's finger, he could not recover, because though the overcrowding may have been evidence of negligence, it was not the proximate cause of the

accident: *Metropolitan R.W. Co. v. Jackson*, 3 A.C. 193; and it is for the passenger who suffers from such an accident to make out a *primâ facie* case of negligence: *Cohen v. Metropolitan R.W. Co.*, 6 Times L.R. 146; *Cormier v. Dominion Atlantic R.W. Co.*, 3 Can. Ry. Cas. 304. If a passenger gets up to shut an open door and falls out, when he might have been on the safe side and have suffered the slight inconvenience of it being open, instead of incurring the evident danger of getting up to close it, he cannot recover damages for his fall from the train: *Adams v. Lancashire etc., R.W. Co.*, L.R. 4 C.P. 739. This case was discussed somewhat unfavourably, however, in *Gee v. Metropolitan R.W. Co.*, L.R. 8 Q.B. 161. A person will be justified in jumping out of a carriage to avoid apparently imminent peril, even though he may be thereby injured; but the peril must at least appear imminent and serious enough to justify a reasonable and prudent man in taking such a risk: *Jones v. Boyce*, 1 Stark 493; *Kearney v. Great Southern, etc., R.W. Co.*, 18 L.R. Ir. 303.

Res ipsa Loquitur. Negligence is sometimes presumed from the mere occurrence of an accident, without adequate explanation by the company: *Scott v. London Dock Co.*, 3 H. & C. 596. The following are instances of this:—Collisions between two trains of the same company: *Skinner v. London, etc., R.W. Co.*, 5 Ex. 787; *Burke v. Manchester, etc., R.W. Co.*, 18 W.R. 694; *Bird v. Great Northern, etc., R.W. Co.*, 28 L.J. Ex. 3; cars being derailed: *Carpue v. Brighton R.W. Co.*, 5 Q.B. 751; *Flannery v. Waterford, etc., R.W. Co.*, I.R. 11 C.L. 30; a car door flying open while the train is moving: *Gee v. Metropolitan R.W. Co.*, L.R. 8 Q.B. 161; or while standing at a station: *Richard v. Great Eastern R.W. Co.*, 28 L.T.N.S. 711; but a window suddenly falling is not *primâ facie* evidence of insecure fastening: *Murray v. Metropolitan R.W. Co.*, 27 L.T.N.S. 762; and a passenger who falls out of a sleeping car berth while changing her position cannot recover without affirmatively proving negligence: *Canadian Pacific R.W. Co. v. Smith*, 1 Can. Ry. Cas. 255, reversing the Supreme Court of Nova Scotia, reported 1 *ib.*, 231, where the cases are discussed at length. Where a passenger in going from one "vestibule" car to another, falls out of a door which has been opened by some unknown means and is killed, his personal representatives cannot recover: *Campbell v. Canadian Pacific R.W. Co.*, 1 Can. Ry. Cas. 258. The subject of injuries to passengers getting on and off trains has been dealt with in the notes to section 204, *ante*.

Liability to Persons other than Passengers. In *Nightingale v. Union Colliery Co.*, 2 Can. Ry. Cas. 47, 35 S.C.R. 65, where a contractor of the defendants was riding, for his own convenience, on defendants' locomotive and was killed by the engine falling through a defective bridge, it was decided that even without any contract relieving the company from liability, the person who uses railway facilities without paying for them, cannot recover any damages for negligence, but only for that "gross" negligence and reckless and wilful disregard of another's safety, that leading into a "trap," which is aptly described by the term "*dolus*."

A similar case, *Harris v. Perry* (1903), 2 K.B. 219, was decided by the English Court of Appeal. In that case the jury found that the plaintiff was on the engine for his own convenience, but with the permission of the defendants' representative, and that the accident was due to the negligence of the defendants' servants. The Court held that the defendants' liability was that of a person who undertakes the carriage of another gratuitously, that the care to be exercised must be reasonable under the circumstances, that there was evidence of such a failure of care on the part of the defendants' servants as would make him responsible for damages arising therefrom, and that the plaintiff was entitled to judgment.

Collins, M.R., in delivering judgment, says at p. 226, that the authorities imply a larger obligation than that of merely not setting a trap. He refers to *Foulkes v. Metropolitan District R.W. Co.* (1880), 5 C.P.D. 157, at p. 165, and also to the discussion in Beven on Negligence in Law, 2nd ed., vol. 2, pp. 1154, *et seq.*

Payne v. Terre Haute R.W. Co., 56 L.R.A. 472; *Purple v. Union Pacific R.W. Co.*, 57 L.R.A. 700; *Chicago, etc., R.W. Co. v. Sattler*, *ibid.*, 890, and *Bolton v. Missouri Pacific R.W. Co.*, 72 S.W.R. 530, are all recent American decisions to the effect that no special liability, apart from reckless or wilful misconduct, rests upon a railway company in favour of a mere trespasser upon the trains, nor, except with certain limitations, in favour of one not a trespasser but a mere licensee.

The mere fact that a conductor may have permitted the plaintiff to ride free upon a train without the consent of the carrier will not enlarge the company's liability: *Graham v. Tor-*

onto, etc., *R.W. Co.*, 23 U.C.C.P. 541, and the payment of a bribe to a conductor to enable the person injured to ride upon a train not intended for passengers will, very naturally, fail to assist him to recover damages: *Canadian Pacific R.W. Co. v. Johnson*, M.L.R. 6 Q.B. 213. From the argument for the railway in the latter case, and from the judgment of Cross, J., it would appear that the decision there was based upon the fact that the plaintiff, being carried free, there was no consideration for the contract of carriage, and therefore no action could be based upon such contract, but there are English and Ontario cases which show that where the plaintiff is rightfully on the train, he can recover damages for injuries, even though he has paid nothing for his passage. This applies to a company's workman who is being conveyed to his place of business: *Torpy v. Grand Trunk R.W. Co.*, 20 U.C.R. 446; to an employee of an express company carried free under an arrangement between the railway and his employers: *Jennings v. Grand Trunk R.W. Co.*, 15 A.R. 477, affirmed as to the measure of damages, 13 A.C. 800; but not where the contract between the employer and the railway does not authorize the free transportation of the former's workmen but the train officials permit it: *Sheerman v. Toronto, etc., R.W. Co.*, 34 U.C.R. 451; though where a newspaper reporter travelled on a fellow-reporter's pass which was marked non-transferable, the reporter when injured was awarded damages on proving a custom on the part of the railway company which in effect abrogated the condition of non-transferability: *Great Northern R.W. Co. v. Harrison*, 10 Exch. 376. So also a person in the employ of the Government travelling free on Government business was allowed to recover for luggage lost: *Martin v. Great Indian, etc., R.W. Co.*, L.R. 3 Ex. 9; as was a person whose passage was paid for by a benefit society: *Skinner v. London, etc., R.W. Co.*, 5 Exch. 787; and a servant whose ticket had been purchased by his master: *Marshall v. York, etc., R.W. Co.*, 11 C.B. 655, the ground of action being the breach of duty towards the servant which the company assumed when they undertook to carry him, as distinguished from any contractual remedies which the person who bought his ticket might have; but in *Alton v. Midland R.W. Co.*, 19 C.B.N.S. 213, where the ticket was bought by the employee for the purpose of travelling on his employer's business, it was held that no corresponding duty was owing to the master on account of loss of the servant's services

due to injuries received on his journey. A somewhat extreme instance of liability towards a person carried free is to be found in *Austin v. Great Western R.W. Co.*, L.R. 2 Q.B. 442, where a mother who had bought a ticket for herself, brought with her into the train without any fraudulent intention a child who was, according to the company's regulations, too old to travel free. The child was injured in an accident arising from the negligence of the defendants. It was also shown that the mother had the plaintiff with her when she bought her ticket, and no questions were asked about the latter's age. The Court of Queen's Bench held that the contract was to carry both the mother and the child for one fare, and though the former might be liable for the child's fare, that did not prevent the latter from recovering damages which resulted from the defendants' negligence; and that the mother's concealment did not alter the child's rights. *Quare*, would fraud on the mother's part, if proved, have altered the liability of the defendants? This question was raised by Blackburn, J., but not answered. Where a plaintiff, having bought a return ticket from one company, came back on a train of defendants, who had running rights over the former's line and divided the profits with it, he was allowed to retain a verdict for injuries sustained, on the ground that the latter company had permitted him to be upon the train and therefore owed him protection from injuries resulting from their negligence or default: *Foulkes v. Metropolitan District R.W. Co.*, 4 C.P.D. 267, 5 C.P.D. 157. Some discussion upon the subject is also to be found in the argument in *Braid v. Great Western R.W. Co.*, 10 U.C.C.P. 137, at page 142, and in the judgment of the Privy Council in *Great Western R.W. Co. v. Braid*, 1 Moore P.C. (N.S.) 101.

From the cases here reviewed, it would appear that the remedy of a person injured on a train does not depend solely upon any contractual relationship between the carrier and himself or upon payment of fare; but, in addition to such contractual liability, the carrier owes a duty of reasonably safe carriage to all who are upon its trains with its permission, even though no fare is paid for the trip; but that where no permission to travel has been given other than the unauthorized permission of those in charge of the train, the traveller cannot recover except, as before mentioned, for fault on the part of the railway company amounting to *dolus*.

Of course, where a person travels otherwise than on the ordinary passenger train, even though he has the company's permission to travel by some other conveyance, as on a freight train, he cannot expect that the same care will be exercised as he has a right to look for upon conveyances intended for passengers: *Hutchinson v. Canadian Pacific R.W. Co.*, 17 O.R. 347, 16 A.R. 429. Where a newsboy boarded a car to sell papers, in accordance with the usual custom, it was suggested, though not definitely decided, that he was not a passenger but at most a licensee, and therefore was not entitled to the same degree of care as a passenger: *Coll v. Toronto R.W. Co.*, 25 A.R. 55, at p. 59.

Appliances and Accommodation. Section 211, *ante*, prescribes certain appliances which must be used on trains, and gives an express right of action to all who are injured by a breach of that section. Apart from such express right, however, it is probably true that anyone suffering special and peculiar injury on account of a failure to observe such statutory precautions as are provided, could recover damages for that injury, and so a person injured by a failure to provide communication between the conductor and engine driver, as required by that section, could no doubt recover at common law: *Blamires v. Lancashire, etc., R.W. Co.*, L.R. 8 Ex. 283. But the neglect of a statutory duty imposed for the benefit of a certain class of people (for example, the neglect to fence for the protection of adjoining landowners) would not of itself vest a right of action in a passenger on the train injured by a collision with cattle trespassing on the track: *Buxton v. North Eastern R.W. Co.*, L.R. 3 Q.B. 549; *Gorris v. Scott*, L.R. 9 Ex. 125. It is the duty of a conductor to ensure, as far as he reasonably can do so, the comfort and safety of passengers under his charge: *Blain v. Canadian Pacific R.W. Co.*, 2 Can. Ry. Cas. 69 and 85; and it has been said that a passenger is entitled to accommodation according to his contract, and in the absence of express contract, he is entitled to all reasonable accommodation: *MacNamara on Carriers* 448. On an unconditional contract to carry, a railway is generally bound to find room for all who offer themselves for carriage: *Hawcroft v. Great Northern R.W. Co.*, 21 L.J.Q.B. 178; and in ordinary cases they are expected to furnish seats for their passengers: 5 Am. & Eng. Ency. of Law, 2nd ed., 590, *Davis v. Kansas City*, 50 Mo. 317; but if there should be any unusual or unexpected influx of intending passengers they can-

not be expected to do so: *Louisville R.W. Co. v. Patterson*, 69 Miss 421. If there are two cars, one of which is filled and another containing empty seats, a traveller cannot compel the conductor to find him room in the crowded car: *Pittsburg v. Van Houten*, 48 Ind. 90. In *Metropolitan R.W. Co. v. Jackson*, 3 A.C. 193, Lord Cairns, at page 198, seems to consider it negligence on the part of a railway company to admit more passengers to a compartment than there are seats. As mentioned in *Blain v. Canadian Pacific R.W. Co.*, 2 Can. Ry. Cas. 69 and 85, 3 Can. Ry. Cas. 143, a conductor in the interests of those travelling has a right and is bound according to the means at hand to preserve order; and apart from the statutory power to eject, which will be discussed in notes to sec. 219, he may eject a passenger who persists in putting his feet on the seats: *Davis v. Ottawa Electric R.W. Co.*, 28 O.R. 654. But though equal accommodation must be afforded all paying the usual and proper charge therefor, there is nothing to prevent a railway company from furnishing additional comforts and luxuries for those willing to pay an increased charge therefor: Hutchison on Carriers, 2nd ed., s. 542; *Day v. Owen*, 5 Mich. 520; *Westchester R.W. Co. v. Miles*, 55 Penn. St. 209. A lady who buys a second class ticket cannot be compelled to travel in a smoking car on the ground that that is the second class car: *Jones v. Grand Trunk R.W. Co.*, 3 O.W.R. 705, and Britton, J., the trial Judge in that case, says, speaking of the terms of this section: "The question of sufficient accommodation is one of fact. The word sufficient cannot be limited to space or capacity or strength. It must refer not only to these things, but also to the reasonable comfort, safety and convenience of the traveller." At the time of writing, this case is standing for judgment before the Court of Appeal.

Continuous Journey. Where a passenger contracts for a continuous journey, he is entitled to be carried the whole distance for the toll paid, and a charge made for additional fare in transferring him from one station to another in a town on his line of route is illegal: *Clarry v. Grand Trunk R.W. Co.*, 29 O.R. 18; but similarly a person contracting for a continuous journey only, without "stop over" privileges may not break his journey at an intermediate point: *Coombs v. The Queen*, 4 Ex.

C.R. 321; 26 S.C.R. 13, following and applying *Craig v. Great Western R.W. Co.*, 24 U.C.R. 504; *Briggs v. Grand Trunk R.W. Co.*, *ib.* 510, and *Cunningham v. Grand Trunk R.W. Co.*, 9 L.C. Jur. 507, 11 L.C. Jur. 107.

Protection of Passengers. This subject is discussed at length in the notes in 2 Can. Ry. Cas. 96 *et seq.* In *Blain v. Canadian Pacific R.W. Co.*, 2 Can. Ry. Cas. 69 and 85; *Canadian Pacific R.W. Co. v. Blain*, 3 Can. Ry. Cas. 143, the rule is laid down that if a railway company through its officers, knows that an assault upon a passenger is probable, it is the former's duty to take reasonable precautions to prevent it, and if it fails to do so, it is liable for the consequences of its neglect. The English case of *Pounder v. North Eastern R.W. Co.* (1892), 1 Q.B. 385, which is a decision to the contrary, was not followed. In the case of *Cobb v. Great Western R.W. Co.* (1894), A.C. 419, Lord Selborne had already dissented from the opinion expressed by the judges in the *Pounder Case*, so that as regards Canada at least, it may be taken to be overruled so far as it purports to lay down any general proposition of law. The American decisions, as a rule, concur in the views stated by the Judges in *Blain v. Canadian Pacific R.W. Co.* See *Putnam v. Broadway, etc., R.W. Co.*, 55 N.Y. 108; *New Orleans, etc., R.W. Co. v. Burke*, 53 Miss. 200; *Lucy v. Chicago, etc., R.W. Co.*, 64 Minn. 7, and 5 Am. & Eng. Ency., 2nd ed., 553. In *Bryce v. Southern R.W. Co.*, 125 Fed. R. 958, a distinction was made between acts of nonfeasance or omission and misfeasance in failing to protect a passenger, and it was said that for the former the servant would only be liable to his employer and not to the passenger. The correctness of this decision was doubted by a writer in the *New York Law Journal* for 1904, p. 2040, and cases to the contrary are there cited.

In *Fraser v. Caledonian R.W. Co.*, 5 F. (Ct. of Sess.) 41, it was decided that where defendants knowingly and without taking proper steps to prevent it, had allowed a greater crowd of intending passengers to congregate on a platform than it would hold, and plaintiff was knocked off and hurt, he might recover.

2. *Liability as Carriers of Goods.*

As already mentioned, railway companies are common carriers of goods and therefore, apart from contract or statute, they are liable as insurers for all goods which they undertake to carry: *Coggs v. Bernard*, 1 Sm. L.C., 9th ed., 199; *Ham v. McPherson*, 6 O.S. 360; and see *Culver v. Lester*, 37 Can. L.J. 421, a learned judgment of McDougall, Co.J., York, where the subject of common carriers is discussed at length. But if a person does not profess to carry goods of the character sued for, he is not liable as a common carrier for their loss. The liability as bailee, of course, would exist: *Roussel v. Aumais*, Q.R. 18 S.C. 474.

The only defences to this liability at common law are that the accident happened through the Act of God, the King's enemies, or some vice inherent in the thing carried: *Coggs v. Bernard* and *Ham v. McPherson*, *supra*; *Nugent v. Smith*, L.R. 1 C.P.D. 19 and 423; *Blower v. Great Western R.W. Co.*, L.R. 7 C.P. 655; *Kendall v. London and South Western R.W. Co.*, L.R. 7 Ex. 373. This latter defence would probably include insufficient packing or fastening of goods where the defect was not reasonably apparent to the carrier on delivery: *Stuart v. Crawley*, 2 Starkie 323; *Richardson v. North Eastern R.W. Co.*, L.R. 7 C.P. 75; *Klauber v. American Express Co.*, 21 Wis. 21; *Ralston v. Caledonian R.W. Co.*, 5 Ct. of Sessions Cases (4th series) 671; *Chippendale v. Lancashire and Yorkshire R.W. Co.*, 21 L.J.Q.B. 22; *Paxton v. North British, etc., R.W. Co.*, 9 Ct. of Sessions Cases (3rd series) 50.

Where goods carried at a lower rate, were insufficiently packed, and wrongly described—being called hardware, whereas they were electric fittings in china and porcelain—it was pointed out that hardware would not be handled as carefully as fittings of this character, and the defendants were relieved from liability: *Connelly v. Great Northern R.W. Co.*, 15 Leg. News 365.

Where fresh meat has been delayed twenty-two hours in summer in reaching its destination, the defendants could not set up successfully that the consequent injury to the meat was owing to its perishable nature: *Delorme v. Canadian Pacific R.W. Co.*, 11 Leg. News 106; and see *Pontbriand v. Grand Trunk R.W. Co.*, M.L.R. 3 S.C. 61; but where the heating of

hay in transit caused increased evaporation and consequent shrinkage, the company on showing such facts are not liable: *Seymour v. Sincennes*, 1 R.L. 716. Where defendants contracted to haul plaintiff's engine on their rails to another town, and in drawing it by horses to the tracks with which it was fitted for that very purpose broke through a defect unknown to either party and the engine was damaged, this was described as vice inherent in the thing carried, and plaintiff's action was dismissed: *Lister v. Lancashire, etc., R.W. Co.* (1903), 1 K.B. 878. Where without negligence on the carrier's part, there is deterioration of perishable articles or evaporation and leakage of liquids, the carrier may successfully defend an action: *Hudson v. Baxendale*, 2 H. & N. 575; *Ohrloff v. Briscoll*, L.R. 1 P.C. 231.

Act of God. An Act of God must be an event, the happening of which could not have been reasonably foreseen. The fact that it has happened before is only evidence that its recurrence might have been expected, but it does not entirely deprive a carrier of this defence: *Nitrophosphate v. London, etc., Docks Co.*, 9 Ch.D. 503.

Accommodation and Appliances. Sections 211 and 214 and the other sections of this Act prescribe in certain instances the character of appliances and accommodation which must be furnished by railway companies. Generally speaking, the accommodation must be adequate to the ordinary conditions of the business which a carrier undertakes, and where a shipowner receives sheepskins in a boat admittedly unfit to carry them, and they were damaged in consequence, the defendants were held liable, and upon a construction of a bill of lading containing provisions exempting them from liability for "unseaworthiness," it was held that these conditions afforded no defence: *Rathbone v. MacIver* (1903), 2 K.B. 378. In all cases of carriage of goods by water, "the common law obligation of a shipowner is to provide a ship reasonably fit to carry the cargo that is shipped upon it. If a shipowner desires to avoid this responsibility he must, I think, use very plain and distinct words to give notice of his intention to get out of this obligation," per Bigham, J.: *Waikato v. New Zealand Shipping Co.* (1898), 1 Q.B. 645, at p. 647, affirmed (1899), 1 Q.B. 56. Where a carrier undertakes to carry gold, and it is known that he has a bullion room for that purpose, a contract is implied that the room is strong enough to resist the attacks of thieves: *Queensland Bank v. Peninsula and*

Oriental, etc., Co. (1898), 1 Q.B. 567; and a carrier who holds itself out as willing to carry goods to a certain place cannot refuse to carry for any one tendering goods for transport there: *Crouch v. London, etc., R.W. Co.*, 14 C.B. 255.

Connecting Carriers. Though this subject depends largely upon the contracts contained in bills of lading and the effect of statutory restrictions upon the right to contract against negligence on the part of railway companies, it may be conveniently dealt with here subject to what is afterwards said about the limitations imposed by statute. The general rule in the case of connecting carriers is that where a railway company receives goods for conveyance beyond its own line (in the absence of any special contract to the contrary, and especially upon payment for the whole journey), it impliedly undertakes responsibility for the complete transit, and is therefore not discharged from its liability by handing over the goods to a second company for further conveyance, but remains liable for a loss of or injury to the goods, even though the same may not have happened on its own line of railway. The law was so stated in the leading case of *Muschamp v. Lancaster and Preston Junction R.W. Co.* (1841), 8 M. & W. 421. This was a case of carriage of a parcel addressed to a point beyond defendants' line, but no receipt or other writing showing the conditions of carriage to destination was given. At the trial the jury were told that where a common carrier receives a parcel so addressed and does not by positive agreement limit his responsibility to a part only of the distance, that is *primâ facie* evidence of an undertaking on his part to carry the parcel to its destination even though that place is beyond the limits within which the carrier professes in general to carry on his trade. This statement of the law was upheld by the Exchequer Chamber upon motion for a new trial on the ground of misdirection. This case was followed in *McGill v. Grand Trunk R.W. Co.* (1892), 19 A.R. 245. The principle of this case has ever since been followed in England. Another important case is *Bristol and Exeter R.W. Co. v. Collins* (1859), 7 H.L. Cas. 194. In that case the contract of carriage was with the Great Western R.W. Co., while the loss (destruction by fire of the goods carried) occurred on the defendants' line. It was held that there was no privity between the plaintiff and defendants, and consequently no liability on the part of the defendants.

Similar decisions upon the ground of want of privity are *Crawford v. Great Western R.W. Co.* (1868), 18 U.C.P. 510; *Richardson v. Canadian Pacific R.W. Co.* (1889), 19 O.R. 369.

In the *Collins Case* the Court had to construe conditions of carriage framed apparently so as to restrict the liability of each carrier to its own line, but it was held that such was not their effect. Practically identical conditions were considered in the case of *Grand Trunk R.W. Co. v. McMillan* (1889), 16 S.C.R. 543, with the addition of a clause that the defendants should not be responsible for any loss, etc., to the goods, if such loss, etc., occurred after the goods arrived at the stations or places on their line nearest to the points or places where they were consigned to or beyond their said limits. Inasmuch as the connecting line (in this case the Canadian Pacific Railway) was, according to the true construction of the contract the line of the defendants' agents, it was held that it must be considered for the purposes of the condition as the defendants' own line. It was held, however, that the defendants' liability at the time the loss occurred was that of warehousemen only, and consequently their responsibility was reduced from that of insurers to one of bailees only, for neglect of duty.

A railway company might, the Supreme Court held in the *McMillan Case*, refuse to enter into a contract to carry beyond its own line, and sec. 246 (3) of The Railway Act, 1888, did not prevent it from restricting its liability for negligence as carriers or otherwise in respect to the goods to be carried after they left its own line. The decision in *Vogel v. Grand Trunk R.W. Co.*, 11 S.C.R. 612, does not govern such a contract.

After the decision in the *McMillan Case* the different railway companies appear to have remodelled their bills of lading. As stated in the judgment in *Lake Erie and Detroit R.W. Co. v. Sales* (1896), 26 S.C.R. 663, at page 675, the initial carrier was thereby made the agent of the shipper to hand the goods to the next connecting carrier, and was not liable for any future loss or damage whatever, and among other things it was provided that "all the provisions of this contract shall apply to and for the benefit of every carrier" to whom goods might be delivered under it as fully as to the company. This form of contract obviated the consequences of the judgment in *Bristol and Exeter R.W. Co. v. Collins* (*supra*), and the contracts were in substance

severally one for the transport of the goods to their final destination for a part of the distance by one carrier and for part by another and so on, with consequent liability by each carrier for loss occurring upon its own portion of the transit, and corresponding exemption for loss occurring beyond it. As put by King, J., in *Northern Pacific R.W. Co. v. Grant* (1895), 24 S.C.R., at page 548, "under English law (differing in this respect from American law) a company receiving goods for carriage to a point beyond its line *primâ facie* contracts for the entire carriage. But it may limit its responsibility to acts or defaults occurring upon its own line, and where this is done it and each carrier in succession comes under an obligation to deliver goods so received to the next carrier."

In that case the agent of the Northern Pacific R.W. Co. at Toronto having arranged with the shipper, the plaintiff, in Ontario, for a shipment of goods *via* G.T.R. and Chicago N.W. Co., in care of the Northern Pacific R.W. Co. at St. Paul, consigned to plaintiff's own order in British Columbia, and the goods having been delivered to E. at British Columbia without an order, it was held that the goods were in the care of the Northern Pacific R.W. Co., from St. Paul to British Columbia, and that that company were liable to the plaintiff for the value of the goods.

Another much litigated case of a through contract is *Merchants Despatch Transportation Co. v. Hately* (1886), 14 S.C.R. 572; 12 A.R. 201; 4 O.R. 723. The transportation company made by correspondence a contract with plaintiff to carry butter from London, Ontario, to Bristol, England. They issued a bill of lading signed by one Barr, describing himself as agent severally, but not jointly, for the G.W. R.W. Co., M.D.T. Co., and G.W.S.S. Co., named as carriers therein—different portions of the transit to be performed by each, and by the bill of lading if damage was caused to the goods during transit the sole liability was to be that of the company having the custody thereof at the time of such damage. A loss having occurred before the goods were handed to the G.W.S.S. Co. by the M.D.T. Co., the M.D.T. Co. were held liable upon the through contract for the damage, and even under the bill of lading they were also liable, as the loss occurred while the goods were in the custody of the defendants—M.D.T. Co.

In *Rennie v. Northern R.W. Co.* (1876), 27 U.C.C.P. 153, the defendants did not undertake to carry for the entire journey, and were consequently held not to be liable for a loss occurring by wrongful delivery at destination.

Another case of limitation of liability, either as carriers, or of no liability as warehousemen in the absence of negligence, is *Brodie v. Northern R.W. Co.* (1884), 6 O.R. 180, where goods were destroyed by fire after being placed in a warehouse awaiting further conveyance by the connecting carrier: See also *Richardson v. Canadian Pacific R.W. Co.*, *supra*.

Even where there is no privity by contract as already explained, a connecting carrier may become liable to the owner for conversion where goods in his possession are voluntarily given by him to another without the owner's consent, and an action of trover will lie: *Leslie v. Canada Central R.W. Co.* (1878), 44 U.C.R. 21; *Roach v. Canadian Pacific R.W. Co.*, 1 Man. Rep. 158.

Other decisions are:—

Rogers v. Great Western R.W. Co. (1858), 16 U.C.R. 520, defendants were held not to be liable for a loss of furs occurring beyond their line, where the contract only provided for *forwarding* the goods beyond their own line.

LaPointe v. Grand Trunk R.W. Co. (1867), 26 U.C.R. 479, defendants held not liable for a loss occurring beyond their own line where the contract provided that the company would not be responsible for any loss, etc., to goods beyond their limits. See also *Fraser v. Grand Trunk R.W. Co.* (1867), 26 U.C.R. 488, a similar case.

Gordon v. Great Western R.W. Co. (1875), 25 U.C.C.P. 488, a case of shipment from Cincinnati at a through rate to Detroit under a contract exempting the first and connecting carriers from liability for loss by fire, it was held, the goods having been destroyed by fire, between Detroit and Thorold, on defendants' line, that there was no such exemption for the latter part of the transit, reversing a former decision in 34 U.C.R. 224.

Jeffrey v. Canadian Shipping Co., M.L.R. 7 Q.B. 1. Where the carrier receives the goods and is paid freight only for carriage to the end of his own route, the fact that he undertakes to deliver them to another carrier there for further shipment does not make him responsible for the delivery of the goods at their ultimate destination.

Neil v. American Express Co., Q.R. 20 S.C. 253, 2 Can. Ry. Cas. 111. An express company is not liable for damages to goods happening on the line of a connecting carrier where the bill of lading contained a clause limiting its liability to accidents occurring on its own line.

Carriage of Animals. As already mentioned, railway companies in Canada are common carriers under the Railway Act and bound to carry animals, including dogs: *McCormack v. Grand Trunk R.W. Co.*, 3 Can. Ry. Cas. 185; see also *The Queen v. Slade*, 21 Q.B.D. 433.

Before detailing certain cases which have been decided upon the duty of carriers of animals, and the effect of the Railway Act of 1903, reference should be made to the provisions of the Criminal Code, sec. 514, appearing under the head of "Cruelty to Animals." This section, which is in effect a re-enactment of R.S.C. c. 172, secs. 8-13, regulates the carriage of cattle upon trains and boats, and requires that they shall not be carried for a longer period than 28 consecutive hours without being unloaded for rest, water and feeding, unless it can be shewn that they have been unavoidably delayed in transit. The cars must also be cleaned out and the floor strewn with clean sand or sawdust before reloading.

Turning now to a consideration of the present Railway Act, it will be observed that the interpretation clause of that statute, sec. 2, no longer refers in terms to animals, as did sec. 2 (*v*) of the former statute, under the term "Traffic." By sec. 2 (*z*) "the expression 'traffic' means and includes passengers, goods and rolling stock," and by sec. 2 (*h*) "the expression 'goods' includes personal property of every description that may be conveyed upon the railway," etc. No doubt the term "personal property" is quite wide enough to include all animals which may be the subject of ownership, but it might not include animals *ferae naturae*. As these are not frequently carried, the point is not likely to arise unless something were to happen to a circus train. As cattle are generally carried at the lower of alternative rates in consideration of the shipper agreeing to relieve the company from liability for damages to them while in transit, or (in certain specified instances where such liability is not entirely waived) limiting the damages to an agreed amount, the section of the Railway Act of 1888 which was most frequently considered in this connection was sec. 246, sub-sec. 3, which pro-

vided that the company should not be relieved from an action for damages for loss occurring upon its line by "any notice, condition or declaration, if the damage arises from any negligence or omission of the company or its servant." The contracts usually signed by shippers of animals are set out in full in the cases of *Grand Trunk R.W. Co. v. Vogel*, 11 S.C.R. 613; *Robertson v. Grand Trunk R.W. Co.* 24 S.C.R. 611, and *Bicknell v. Grand Trunk R.W. Co.*, 26 A.R. 431. Though sub-secs. 1 and 2 of sec. 246 have been considerably altered in the present statute, in which they appear as sec. 214, the words of sub-sec. 3 already quoted remain in the new section, so that the cases above mentioned might still be regarded as applicable were it not for the further provision appearing for the first time as sec. 275, sub-sec. 1, of this Act, which enacts as follows: "No contract, condition, by-law, regulation, declaration or notice made or given by the company impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall relieve the company from such liability except as hereinafter provided, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the board." The exceptions to the general rule laid down by the words quoted are stated in the following sub-sections of the same section, and need not now be referred to in greater detail. The general subject of limiting a carrier's liability by contract is discussed *infra*.

Were it not for some such enactments as those in question, any contract which a shipper of cattle might make, and which in terms relieved the carrier from liability, would no doubt be binding: *O'Rorke v. Great Western R.W. Co.*, 23 U.C.R. 427; *Hood v. Grand Trunk R.W. Co.*, 20 U.C.C.P. 361.

In the case of shipments of live stock it is usual to provide that a man shall be sent in charge of the cattle, and where it can be shown that the damage to the cattle is due to neglect or carelessness on the part of the owner or his agent who is thus in charge, the company will not be held liable: *Farr v. Great Western R.W. Co.*, 35 U.C.R. 534; so also where a man is carried by the company for the purpose of looking after the cattle while in transit, but upon the express agreement that the company shall not be liable for any accident to him, whether due to negligence or not, such a condition is binding, and the person so injured cannot recover damages sustained while in transit: *Bicknell v.*

Grand Trunk R.W. Co., 26 A.R. 43, and where an animal is delivered to a company for carriage, and is fastened by a strap furnished by the owner, which is apparently sufficient to secure him, the company is not liable: *Richardson v. North Eastern R.W. Co.*, L.R. 7 C.P. 75, but this was decided upon the ground that in this instance the company were not common carriers of dogs; which, according to *McCormack v. Grand Trunk R.W. Co.*, 3 Can. Ry. Cas. 185, is not the law under our Railway Act. The fact that the fastening was insecure being perfectly apparent when the company accepted a dog for carriage, it was held liable for its escape, even though the fastening was that which was furnished by the owner: *Stuart v. Crawley*, 2 Stark. 323; and as it is generally the duty of a carrier to see that an animal which it undertakes to convey is properly secured, it is liable even though its servant undertakes to secure it in the car in presence of the owner, if it escaped and thus sustained injury, as the owner, in the absence of special knowledge upon the subject is not supposed to know how best to secure it during transportation: *Paxton v. North British, etc., R.W. Co.*, 9 Ct. of Sess. Cas., 3rd Ser., 50; but where a horse has been fastened in the usual way in a car, but by some means struggled through an opening twenty-five inches wide and was thereby injured; it was held that as it was most improbable that it should have wriggled through such a small opening, the company could not be considered negligent, and were therefore entitled to rely upon a condition relieving them from liability: *Ralston v. Caledonian R.W. Co.*, 5 Sess. Cas. (4th Ser.), 671; so also where the owner was by the terms of his contract, to himself inspect the car into which his cattle were loaded, and the cattle during transit became alarmed and broke out; an action against the company was dismissed: *Chippendale v. Lancashire, etc., R.W. Co.*, 21 L.J.Q.B. 22. If an animal escapes or is injured because it or some of 'its "fellow travellers" becomes unmanageable and breaks out or kicks, this is held to be "vice inherent in the thing carried" and the carrier would be relieved from liability at common law, and apart even from the provision of any special contract: *Blower v. Great Western R.W. Co.*, L.R. 7 C.P. 655; and where a horse is injured during transit, and there is nothing to show how the accident occurred, the Court, drawing inferences of fact, may assume that the accident was due to the "vice" of the horse rather than to any negligence of the car-

riers: *Kendall v. London, etc., R.W. Co.*, L.R. 7 Ex. 373; see also *Nugent v. Smith*, 1 C.P.D. 423, and the following American cases: *Newby v. Chicago, etc., R.W. Co.*, 19 Mo. App. 391; *Hutchinson v. Chicago, etc., R.W. Co.*, 37 Minn. 524; *Betts v. Farmers', etc., Co.*, 21 Wis. 81; *Evans v. Fitchburg R.W. Co.*, 111 Mass. 142; *Coupland v. Housatonic R.W. Co.*, 61 Conn. 531.

3. Liability as Warehousemen.

If the contract of carriage has terminated and the goods are in the possession of the carriers as warehousemen only, the latter is not liable for loss or damage to them unless some negligence on its part can be shewn: *Ham v. McPherson*, 6 O.S. 360; *Milloy v. Grand Trunk R.W. Co.*, 23 O.R. 454, 21 A.R. 404; *Walters v. Canadian Pacific R.W. Co.*, 1 Terr. L.R. 88, 1 N.W.T. 17; *Lake Erie and Detroit R.W. Co. v. Sales*, 26 S.C.R. 663.

Carriers become warehousemen either (a) where notice of the arrival of the goods has been given to the consignee and he has had a reasonable time to remove them: *Grand Trunk R.W. Co., v. Gutman*, 3 Rev. Leg. 452; *Richardson v. Canadian Pacific R.W. Co.*, 19 O.R. 369; *McKay v. Lockhart*, 4 O.S. 407.

(b) Where even though no notice is given, he knows, or ought to know, of their arrival, and does not claim them: *Bowie v. Buffalo, etc., R.W. Co.*, 7 U.C.C.P. 191; *O'Neill v. Great Western R.W. Co.*, *ibid.*, 203; *Inman v. Buffalo and Lake Huron R.W. Co.*, *ibid.*, 325; *Chapman v. Great Western R.W. Co.*, 5 Q.B.D. 278; *Bradshaw v. Irish and North Western R.W. Co.*, 7 Ir. R. C.L. 252; *Mason v. Merchants Bank*, Q.R. 14 S.C. 293.

(c) Where through some fault of the shipper or consignee the contract of carriage has not begun or been completed, but the goods remain in the hands of the railway: *Milloy v. Grand Trunk R.W. Co.*, *supra*.

Where by reason of a refusal on the part of the consignees to receive the goods when tendered, they are left in defendants' hands, the defendants being warehousemen are liable only for gross negligence: *Grand Trunk R.W. Co. v. Frankel*, 2 Can. Ry. Cas. 155, reversing *Frankel v. Grand Trunk R.W. Co.*, *ib.*, 136. In that case cars of iron had been consigned to the consignees at Swansea. The custom was on arrival there and notification of the fact to consignees, to have the cars taken to the latter's

siding. The cars in question, however, were refused at Swansea and the refusal afterwards countermanded, but in the interval the cars had been frozen in, and before delivery the price of iron had fallen. As no negligence on the defendants' part was shewn, however, the action against them was dismissed. Where notice of the arrival of goods had been given on the day they reached the station, but they were not removed, and five days later they were destroyed by fire, it was held that the notice given was sufficient, that the consignee had had a reasonable time to remove the goods, and not having done so he could not recover: *McMorris v. Canadian Pacific R.W. Co.*, 1 Can. Ry. Cas. 217; see also *Mitchell v. Lancashire, etc., R.W. Co.*, L.R. 10 Q.B. 256, 263; *Bradshaw v. Irish, etc., R.W. Co.*, Ir. R. 7 C.L. 252. If a consignee fails to take delivery of a horse, proper expenses incurred by the company in caring for it may be recovered: *Great Northern R.W. Co. v. Swaffield*, L.R. 9 Ex. 132. There is no warranty by a warehouseman of the safety of his building, and so if goods are injured by a contractor's negligence the warehouseman is not liable: *Searle v. Loverick*, L.R. 9 Q.B. 122; but if a warehouseman does some unauthorized act to the goods amounting to a conversion he is liable to the owner: *Hiort v. Bott*, L.R. 9 Ex. 86; *Lilley v. Doubleday*, 51 L.J.Q.B. 310. If a railway company undertakes to store goods for reward, it would then be, not a mere gratuitous bailee as in the *Frankel Case*, but a bailee for hire and bound to take ordinary and reasonable care of the commodity entrusted to its charge: *Beal v. South Devon R.W. Co.*, 3 H. & C. 337, at p. 342; *Dunn v. Prescott Elevator Co.*, 4 O.L.R. 103; reported on an earlier appeal, 26 A.R. 389; 30 S.C.R. 620; see also *Rosenbloom v. Grand Trunk R.W. Co.*, Q.C. 16 S.C. 360.

The question whether a railway company is bound to give notice of the arrival of the goods at destination is one of some difficulty, it being more than once held that a consignee is bound to know when goods are expected and to attend at the company's premises and demand them. For a discussion of this subject see: *Richardson v. Canadian Pacific R.W. Co.*, 19 O.R. 369; *Masson v. Merchants Bank*, Q.R. 14 S.C. 293; *Norway Plains v. Boston and Maine R.W. Co.*, 1 Gray (Mass.) 263; *Baker v. Brown*, 138 Mass. 343; *Berry v. West Virginia R.W. Co.*, 11 Am. & Eng. Ry. Cases (N.S.) 103, at p. 119; *Chapman v. Great Western R.W. Co.*, 5 Q.B.D. 278; *Bradshaw v. Irish, etc., R.W.*

Co., 7 Ir. R. C.L. 252; *Montreal Navigation Co. v. L'Ecuyer*, 21 Can. L.T. 249, and notes to *Allan v. Pennsylvania R.W. Co.*, 10 Am. & Eng. Ry. Cases (N.S.) 347.

4. *Contracts Limiting Liability.*

Apart from statute a carrier may by contract limit his liability even where the damage is the result of his own negligence: *Hinton v. Dibbin*, 2 Q.B. 646; *Hamilton v. Grand Trunk R.W. Co.*, 23 U.C.R. 600; *Bates v. Great Western R.W. Co.*, 24 U.C.R. 544; *Spettigue v. Great Western R.W. Co.*, 15 U.C.C.P. 315; *Dodson v. Grand Trunk R.W. Co.*, 8 N.S.R. 405; *Dixon v. Richelieu and Ontario Navigation Co.*, 15 A.R. 647, 18 S.C.R. 704, though it has been suggested that some consideration for such an exception, other than the promise to carry, must be shewn: *Sutherland v. Great Western R.W. Co.*, 7 U.C.C.P. 409; and where a shipper accepts a bill of lading containing stipulations against the carrier's liability, he must in the absence of proof of fraud or mistake, be deemed to have read it; but that conclusion does not follow where the document is given out of the ordinary course of business and seeks to vary the terms of a prior mutual agreement: *North-West Transportation Co. v. McKenzie*, 25 S.C.R. 38. And where there is a condition that the goods are shipped at "owner's risk" or in other terms relieving the company from liability, it has been held that unless such words expressly cover loss due to the negligence of the carrier or his servants, they will not be construed so as to include such negligence, and all such conditions are construed strictly against the carrier: *Waikato v. New Zealand Shipping Co.* (1898), 1 Q.B. 645; (1899), 1 Q.B. 56. In *St. Mary's Creamery Co. v. Grand Trunk R.W. Co.*, 2 Can. Ry. Cas. 122, Meredith, J., says, at p. 128: "The cases have gone to an extraordinary length in excluding from a condition limiting liability, loss occasioned by the negligence of the defendants or their servants." This judgment was affirmed in 3 Can. Ry. Cas. 447; and so even though goods had been accepted "at the owner's sole risk," yet it was held that defendants were liable for loss occasioned by their servants' negligence in not housing the goods or otherwise sufficiently protecting them from the weather although plaintiff knew the condition of the goods and neglected to remove them till after the injury: *Mitchell v. Lancashire, etc., R.W. Co.*, L.R.

10 Q.B. 256; and conditions in a shipping receipt relieving the carrier from liability for loss or damage arising out of the safe keeping and carriage of the goods even though caused by the negligence, carelessness or want of skill of the carriers' servants without the actual privity or fault of the carriers, do not apply to cases where the goods have been wrongfully sold or converted by the carrier: *Wilson v. Canadian Development Co.*, 32 S.C.R. 432, reversing 9 B.C.R. 82. Where consignors agreed by their own shipping bill to insure the goods, and did so, but countermanded the insurance, and a bill of lading was issued by defendants requiring plaintiffs to insure, it was held, that the defendants could not set up a breach of the condition to insure because the loss had happened through their own negligence: *St. Mary's Creamery Co. v. Grand Trunk R.W. Co.*, *supra*.

The judgment in the *St. Mary's Creamery Case* is supported by the decision given almost at the same time in *Price v. Union Lighterage Co.* (1903), 1 K.B. 750.

In this case goods were loaded on a barge under a contract for carriage by which the barge owner was exempt from liability "for any loss or damage to goods which can be covered by insurance." The barge was sunk owing to the negligence of the servants of the barge owner and the goods were lost. It was held that the barge owner was not exempt from liability for the loss or damage caused by the negligence of his servants. Walton, J., in delivering his judgment, proceeds upon the same lines as in the *St. Mary's Creamery Case*. He also states that the law of England, unlike the law in the United States of America (which latter, as Meredith, J., points out, has been adopted in Canada by legislation), does not forbid the carrier from exempting himself by contract from liability for the negligence of himself and his servants, but if the carrier desires so to exempt himself, it requires that he shall do so in express, plain and unambiguous terms, citing the cases already referred to by Meredith, J., also *Compania de Navigacion La Flecha v. Brauer* (1897), 168 U.S. 104. Accordingly the condition of exemption in the case is construed as meaning: "*I will use reasonable skill and care in the conveyance of goods, but I will not undertake any liability as insurer for loss or damage which can be covered with insurance with underwriters*," and the loss being in fact caused by negligence of the lightermen, the defendant was held liable.

Where, however, a carrier in express terms provides that he shall not be responsible for his own or his servants' negligence, such a contract is (apart from statutory restrictions) valid at common law in Ontario: *Dixon v. Richelieu and Ontario, etc., Co.*, 15 A.R. 647, 18 S.C.R. 704; and also in Quebec: *Glengoil Steamship Co. v. Pilkington*, 28 S.C.R. 146, on appeal from Q.R. 6 Q.B. 95; and where a carrier stipulates that it shall be liable for wilful misconduct only; it is not liable for mere negligence: *Knox v. Great Northern R.W. Co.* (1896) 2 Ir. R. 632, and see *Graham v. Belfast, etc., R.W. Co.* (1901) 2 Ir. R. 13.

Effect of Railway Act, 1888, section 246(3). Probably owing to the pointed remarks of Sir William Young, of Nova Scotia, in *Dodson v. Grand Trunk R.W. Co.*, 8 N.S.R. 405, where the law was elaborately reviewed, a statute was passed in 1871, which in 1888 appeared as section 246 of 51 Vict., cap. 29 (Dom.), which, after providing for "sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previously thereto (the starting of the train) offered for transportation," etc., enacts by subsec. 3 that "every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company from which action the company shall not be relieved by any notice, condition or declaration if the damage arises from any negligence or omission of the company or of its servant." Prior to the decision in *Grenier v. The Queen*, 6 Ex. C.R. 276, and *The Queen v. Grenier*, 30 S.C.R. 42, 2 Can. Ry. Cas. 409, it was the law that this clause had the effect of annulling any contract for exemption from liability for damage to goods carried, where it could be shewn that the railway company was negligent: *Henry v. Canadian Pacific R.W. Co.*, 1 Man. L.R. 210; *Grand Trunk R.W. Co. v. Vogel*, 11 S.C.R. 612; but the decision last named has been disapproved of in the case of express contracts limiting liability by the Supreme Court in *The Queen v. Grenier*, *supra*, though it is not as yet formally overruled. This case was followed and approved by the Supreme Court in *Grand Trunk R.W. Co. v. Miller*, 3 Can Ry. Cas. 147, which has been discussed in the notes to section 211, *ante*, but in *St. Mary's Creamery Co. v. Grand Trunk R.W. Co.*, 2 Can. Ry. Cas. 122, at pp. 130 and 131, Meredith, J., discusses and distinguishes the *Grenier Case* at some length, and notwithstanding the Supreme Court's apparent disapproval of the *Vogel Case*, the Court of

Appeal for Ontario follows it in *St. Mary's Creamery Co. v. Grand Trunk R.W. Co.*, in appeal 3 Can. Ry. Cas. 447. The following rules for the construction of section 246 of the Act of 1888 were suggested in an article in 20 Can. L.T. pp. 1 and 25 and in a somewhat altered form are now reproduced:—

1. The section does not prevent a carrier from throwing the onus of proving its negligence upon the shipper: *Cobban v. Canadian Pacific R.W. Co.*, 26 O.R. 732, 23 A.R. 115; *Grand Trunk R.W. Co. v. Vogel*, 11 S.C.R. 612; *Czech v. General Steam Navigation Co.*, L.R. 3, C.P. 14; and though a carrier may not by a notice stipulate that in consideration of a reduced charge, he shall not be liable for his own or his servant's negligence, yet where such a condition has been made, the owner of the goods must prove such negligence: *Drainville v. Canadian Pacific R.W. Co.*, Q.R. 22 S.C. 480; but where goods shipped are missing entirely the shipper must show that it is not his fault, no matter what condition may exist: *Curran v. Midland R.W. Co.* (1896) 2 Ir. R. 183.

2. The section would not deprive a railway company of its common law defences that the damage was due to the Act of God, the King's enemies or some vice inherent in the thing carried: *Kendall v. London, etc., R.W. Co.*, L.R. 7 Ex. 373; *Blower v. Great Western R.W. Co.*, L.R. 7 C.P. 655; *Nugent v. Smith*, 1 C.P.D. 19 and 423; *Paxton v. North British, etc., R.W. Co.*, 9 Ct. of Sess. (3rd ser.) 50.

3. Nor as mentioned above, need a railway company assume responsibility for connecting lines, provided it clearly appears that the carrier's responsibility is limited to its own line: *Lake Erie, etc., R.W. Co. v. Sales*, 26 S.C.R. 663 and cases cited *supra*.

4. The section does not take away a railway company's defence of contributory negligence: *Bunch v. Great Western R.W. Co.*, 17 Q.B.D. 215, 13 A.C. 31; *Bate v. Canadian Pacific R.W. Co.*, 14 O.R. 625, 15 A.R. 388, 18 S.C.R. 697; *Farr v. Great Western R.W. Co.*, 35 U.C.R. 534.

5. A carrier may limit beforehand, the amount of damages that may be recovered in case a loss happens through its negligence: *Robertson v. Grand Trunk R.W. Co.*, 24 O.R. 75, 21 A. R. 204, 24 S.C.R. 611; but the agreement limiting the liability must be made before shipment: *Abrams v. Milwaukee R.W. Co.*, 61 Am. and Eng. Ry. Cas. 313. A contract for insurance

of the goods by the shipper is a contract for complete exemption from liability and not a contract limiting the damages recoverable and a breach of such a contract by the shipper would not relieve the carrier from the consequences of its own negligence: *St. Mary's Creamery Co. v. Grand Trunk R.W. Co.*, 3 Can. Ry. Cas. 447.

6. Agreements providing for the performance by the shipper or consignee of certain conditions precedent to the issue of the writ may be valid even where there is negligence. An instance of this occurs where notice of loss or damage must by the terms of the contract be given by the claimants within a prescribed time *Lake Erie and Detroit R.W. Co. v. Sales*, 26 S.C.R. 663; *McMillan v. Grand Trunk R.W. Co.*, 16 S.C.R., at pp. 559 and 560; *Mason v. Grand Trunk R.W. Co.*, 37 U.C.R. 163; *Moore v. Harris*, L.R. 1 A.C. 318; *Gélinas v. Canadian Pacific R.W. Co.*, Q.R. 11 S.C. 253; *St. Louis R.W. Co. v. Hurst*, 55 S.W.R. 215. Where there is no statute preventing recovery the consignor must comply strictly with such a term as a condition precedent to recovery against an express company for failure to deliver a parcel to the consignee: *Martin v. Northern Pacific Express Co.*, 10 Man. L.R. 595; *Northern Pacific Express Co. v. Martin*, 26 S.C.R. 135, see *Union Steamship Co. v. Drysdale*, 8 B.C.R. 228, 32 S.C.R. 379.

7. If it can be shewn that the negligence relied upon by the plaintiff is not within the scope of the section, a condition aptly worded may be a defence even against such negligence: 20 Can. L.T. 8 and 31, *et seq.*; *Scarlett v. Great Western R.W. Co.*, 41 U.C.R. 211; and see remarks of Patterson, J. A., in *McMillan v. Grand Trunk R.W. Co.*, 15 A.R. at p. 18. Thus where an accident happened owing to the faulty construction of the roadbed and there was an agreement limiting liability for negligence, it was held that the section then in force, similar to that quoted, applied only to negligence in the management of trains and handling of goods, and, therefore, the statute did not annul the contract. It was so decided in *Bate v. Canadian Pacific R.W. Co.*, 14 O.R. 625, reversed in the Supreme Court on a question of fact, but without dissent from the principle quoted: 15 A.R. 388, 18 S.C.R. 697; and thus, where a person travels on a free pass he is not a passenger within the section, and cannot recover for damages resulting from a railway's negligence where he has agreed to assume all risks: *Bicknell v. Grand Trunk R.W. Co.*,

26 A.R. 431; *The Stella* (1900), P. 161; *Nightingale v. Union Colliery Co.*, 2 Can. Ry. Cas. 47, 35 S.C.R. 65, and see *Central Vermont R.W. Co. v. Franchère*, 35 S.C.R. 68, per Nesbitt, J., at pp. 73 and 74; but the contrary is the rule in the United States: *New York Central R.W. Co. v. Lockwood*, 17 Wall. 357. Nor does the section apply where the railway has ceased to be a carrier and has become a warehouseman, even though negligence is proved, provided there is an agreement relieving it from liability: *Walters v. Canadian Pacific R.W. Co.*, 1 Terr. L.R. 88.

8. Where any condition or contract is relied upon as a defence to an action for loss or damage to goods it is necessary that the contract should actually have come into operation: *Whitman v. Western Counties R.W. Co.*, 17 N.S.R. 405, and that the railway should be acting in performance of that very contract: *Mallett v. Great Eastern R.W. Co.* (1899), 1 Q.B. 309, and see *Armstrong v. Michigan Central R.W. Co.*, 1 O.W.R. 714.

9. As stated by Meredith, J., in the *St. Mary's Creamery Case*, 2 Can. Ry. Cas. 122, there is no law in Canada under the Dominion Railways Act requiring that conditions in bills of lading shall be just and reasonable. The English Railways and Canal Traffic Act, 17 and 18 Vict., cap. 3, sec. 7, in which this provision appears, has never been enacted in Canada: see *Burdett v. Canadian Pacific R.W. Co.*, 10 Man. L.R. 5.

10. The statute has no operation outside Canada, and, therefore, where an accident happened in the United States, a contract limiting liability applied and furnished a defence to the railway company: *Macdonald v. Grand Trunk R.W. Co.*, 31 O.R. 663.

Statements in Shipping Bill as Evidence. Though a condition exempting from liability for damages on a connecting line is valid, yet the original carrier must show that the accident happened off his line if he would succeed: *Mahony v. Waterford, etc., R.W. Co.* (1900), I.R. 2 Q.B. 273, and see *Logan v. Highland R.W. Co.*, 2 Ct of Sess. (5th ser.) 292, and in the absence of proof that the accident happened on the connecting carrier's line, the latter is not liable: *Twohey v. Great Southern, etc., R.W. Co.* (1898), 2 Ir. R. 789. Where a bill of lading given by defendants stated the number of pieces of lumber re-

ceived and their superficial feet and delivery was not in accordance with the receipt, it was held in an action to recover freight for the lumber not delivered that the bill of lading was conclusive as to the number and quantity of the lumber received: *Mediterranean, etc., Co. v. Mackay* (1903), 1 K.B. 297, but a statement in a shipping bill shown to be inaccurate would not operate as an estoppel: *Lohden v. Calder* 14 Times, L.R. 311. Where through the fault of the carrier goods have been incorrectly way billed the carrier will be liable for failure to deliver: *Bell v. Windsor, etc., R.W. Co.*, 24 N.S.R. 521.

Effect of Railway Act, 1903. Though sub-sections 1 and 2 of section 246 of the Act of 1888 have been considerably altered by section 214 of the present Act, the words of sub-section 3 of the former section remain in the new section, so that the cases above mentioned might still be regarded as applicable were it not for the further provision appearing for the first time as section 275, sub-section 1, of the Act of 1903, which enacts as follows: "No contract, condition, by-law, regulation, declaration or notice made or given by the company impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall relieve the company from such liability except as hereinafter provided, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the Board." The exception to the general rule laid down by the words quoted are stated in the following sub-sections of the same section, and need not now be referred to in greater detail. The effect of this provision is not limited to contracts relieving carriers from their negligence, but applies to all contracts for the carriage of traffic, so that unless the class of contract relied upon has been approved by the Board, the company can hardly rely upon it as a defence to any action brought upon it for a breach of contract to carry traffic. Section 275 is more fully discussed in the notes upon it, *infra*.

5. Who May Sue for Failure to Carry Properly.

In the absence of special circumstances, the carrier's contract to carry goods is with the person in whom the property in the goods is vested and so where goods are delivered to a carrier for a purchaser under a binding contract of purchase, the consignee is the proper person to sue the carrier whether he has nominated

him or not: *Dutton v. Solomonson*, 3 B. & P. 582; *Finn v. Railroad*, 112 Mass. 528, and the consignor is deemed to be the agent of the consignee to retain the carrier: *King v. Meredith*, 2 Camp. 639; *Brown v. Hodgson*, *ibid*, 36; *London, etc., R.W. Co. v. Bartlett*, 7 H. & N. 400; but this general rule may be varied by a special contract with the consignor that the carrier will be liable only to him: *Moore v. Wilson*, 1 T.R. 659, and see *Great Western R.W. Co. v. Bagge*, 15 Q.B.D. 625. If the contract has been made with A. it is no answer to an action by him that the compensation for the loss has been paid to B. who delivered the goods to the company: *Coombs v. Bristol, etc., R.W. Co.*, 3 H. & N. 1. Where goods are delivered to the carrier for transport to a certain place for the consignee whose name is given, the inference being that the latter is the owner, he may change the place of destination of the goods: *London, etc., R.W. Co. v. Bartlett*, 7 H. & N. 400. Where the property in goods was not to pass to the consignee until they were delivered to him in Toronto, the consignor was held to be the proper person to sue: *Steele v. Grand Trunk R.W. Co.*, 31 U.C.C.P. 260. It is so also where there is no binding contract of sale sufficient to satisfy the Statute of Frauds even though the consignee may have nominated the carrier: *Coats v. Chaplin*, 3 Q.B. 483; *Coombs v. Bristol, etc., R.W. Co.*, 3 H. & N. 510; or where the goods are sent on approval: *Swain v. Shepperd*, 1 M. & Rob. 223. A bailee of goods forwarding them by a carrier may maintain an action against the latter as he has a special property in them: *Freeman v. Birch*, 1 Nev. & M. 420, 3 Q.B. 492, n.

In carrying passengers the liability for injury to them by negligence does not depend upon express contract: *Browne & Theobald on Railways*, 3rd Ed. 302, and so where a society chartered a train and pays for it, individual members who pay the society and are injured, may sue the railway: *Skinner v. London, etc., R.W. Co.*, 5 Ex. 787, and a reporter travelling on a non-transferable ticket issued to another reporter, but in accordance with a practice which had grown up with the company's acquiescence, may sue: *Great Northern R.W. Co. v. Harrison*, 10 Ex. 376. A mother erroneously thought her child could travel free with her and did not buy a ticket for it. The child being injured was allowed to recover: *Austin v. Great Western R.W. Co.*, L.R. 2 Q.B. 442. Corn was consigned to the Bank of Montreal or their assigns, the Bank assigned it to plaintiff who

sued for non-delivery and it was held that he might recover as there was no plea denying his property in the corn and he was admitted to be the owner at the time it was shipped: *Kyle v. Buffalo, etc., R.W. Co.*, 16 U.C.C.P. 76. A connecting carrier receiving goods delivered to it by another company which has entered into a contract for carriage with the shipper, cannot be sued upon that contract and is not liable under it, as there is no privity of contract between himself and the shipper: *Richardson v. Canadian Pacific R.W. Co.*, 19 O.R. 369. Where a person is a common carrier and a tender of goods for carriage and of a reasonable charge therefor is proved, the consignor may sue him for a refusal to carry the goods: *Leonard v. American Express Co.*, 26 U.C.R. 533.

Stoppage in Transitu. Where goods are delivered to a carrier as such the right of stoppage continues as long as the goods are in his possession as carrier: *Bethell v. Clark*, 19 Q.B.D. 553, 20 Q.B.D. 615; *Ex parte Cooper*, 11 Ch.D. 68, and in such a case, if the carrier declined to re-deliver them or delivers them to the vendee he may be liable to the vendor for their value: *Abbott on Railways*, 315; *Campbell v. Jones*, 3 L.C. Jur. 96; and where, after insolvency of the consignee and notice by the consignor to stop the goods, the carrier's agent delivered them to a third person who had passed them through the Customs, the carrier was held liable for such delivery: *Ascher v. Grand Trunk R.W. Co.*, 36 U.C.R. 609; but stoppage of goods by a Customs' officer is not a protection to the carriers unless they can show that he was properly authorized to make a seizure or to stop them: *Robson v. Buffalo, etc., R.W. Co.*, 9 U.C.C.P. 183. Where goods have arrived at their destination, but owing to some informality in the demand made by the consignee for them, they have not been delivered to him and before the carrier agrees to deliver to the consignee the goods are stopped by the consignor, the *transitus* is not at an end and the stoppage is valid: *Anderson v. Fish*, 16 O.R. 476, 17 A.R. 28; but "when the goods have arrived at their destination and have been delivered to the purchaser or his agent, or when the carrier holds them as warehouseman for the purchaser and no longer as carrier only, the *transitus* is at an end:" *per* Cave, J., *Bethell v. Clark*, 19 Q.B.D., at p. 561, and see *Lyons v. Hoffnung*, 15 A.C. 391. Delivery upon the purchaser's ship is equivalent to delivery to the purchaser: *Schotsmans v. Lancashire, etc., R.W. Co.*, 2 Ch. 332;

but delivery to the purchaser of part of a consignment does not necessarily prevent the consignor from exercising his right to stop the rest: *Bolton v. Lancashire, etc., R.W. Co.*, L.R. 1 C.P. 431; and when the purchaser refuses to accept the goods the right of stoppage remains: *ibid.*; but if the consignee has transferred the property in the goods to a *bonâ fide* purchaser the right is lost: *Leask v. Scott*, 2 Q.B.D. 376. The carrier's duty on receiving a notice to stop the goods is to hold them and if there is any doubt of the vendor's right, to apply for an interpleader order, charging storage for his services as warehouseman meanwhile: *Childs v. Northern R.W. Co.*, 25 U.C.R. 165, per Draper, C.J., at p. 169.

6. *Measure of Damages.*

The measure of damages in actions for injuries to passengers has been discussed in the notes on "Negligence in operation of a railway" preceding section 211 *ante*.

As has been seen before a company may in spite of sub-section 3 of section 214 limit the amount of damages recoverable.

Generally speaking a carrier is liable for such damages as may be reasonably supposed to have been in contemplation by the parties when they made the contract: *Horne v. Midland R.W. Co.*, L.R. 8 C.P. 131, at p. 137; but where goods are shipped for a particular object not known to the carrier damages due to inability to carry out that purpose cannot be recovered: *Hadley v. Baxendale*, 9 Ex. 341; *British Columbia, etc., Co. v. Nettleship*, L.R. 3 C.P. 499; and, following that case, it was decided in *Hamilton v. Hudson Bay Co.*, 2 B.C.L.R. (part 2) 176, that the expected profits on goods shipped were too remote and that where there has been loss from delay beyond the invoice or actual value of the goods, they can only be compensated by interest on such value. In *Behan v. Grand Trunk R.W. Co.*, 11 Que. L.R. (S.C.) 60 damages for loss of profits which might reasonably have been expected were allowed by the Quebec Courts; but in England profits which would have been made on sales by the plaintiff's traveller were not allowed: *Great Western R.W. Co. v. Redmayne*, L.R. 1 C.P. 329, nor damages for loss of profits upon a sale made to a third person: *Horne v. Midland R.W. Co.*, L.R. 8 C.P. 131; *Thol v. Henderson*, 8 Q.B.

D. 457. In *Dunn v. Bucknall* (1902), 2 K.B. 614, it is said that there is no rule of law that damages cannot be recovered for loss of market on a contract of carriage by sea; although a stipulation that a railway should not be liable for damages for loss of market was upheld: *Duckham v. Great Western R.W. Co.*, 80 L.T.N.S. 744. The following decisions on this subject may also be usefully consulted. *Great Northern R.W. Co. v. Swaffield*, L.R. 9 Ex. 132. Consignee failed to take delivery of a horse, the carrier was allowed to charge the expense of keeping him. *Woodger v. Great Western R.W. Co.*, L.R. 2 C.P. 318. Hotel expenses incurred while waiting for goods that have been delayed cannot be recovered. *Hales v. London, etc., R.W. Co.*, 4 B. & S. 66. Expenses necessarily incurred in looking for goods will be allowed. *Waller v. Midland, etc., R.W. Co.*, 4 L.R. Ir. 376, where defendants failed to provide horse boxes and therefore horses were sent by road and owing to its bad condition, they were injured, the measure of damages was the deterioration caused by being sent by road and the additional time and labour expended. *Irvine v. Midland, etc., R.W. Co.*, 6 L.R. Ir. 55, where by contract, goods were to be sent in cars of a particular kind, but owing to the absence of such cars, the consignor did not deliver the goods to the carrier but sold them on the spot, he could not recover the difference in market value between the place of shipment and destination.

Other English cases are collected in Browne and Theobald 3rd Ed. 297 and 298, and a discussion upon the law in Canada will also be found in Abbott on Railways, pp. 419, *et seq.*

Regular-
ity in
train
time.

215. All regular trains shall be started and run, as near as practicable, at regular hours, fixed by public notice. 51 V. c. 29, s. 246 part.

This was formerly the first part of section 246 of the Railway Act of 1888.

Delay to Passenger—Time Tables. For passenger business, time tables are usually issued, giving the times at which trains arrive and depart. While a contract to carry from A. to B. must without some condition to the contrary, be literally performed and cannot be satisfied by landing the passenger at another point near B.: *Hobbs v. London, etc., R.W. Co.*, L.R.

10 Q.B. 111, yet the mere issue of a ticket from A. to B. apart from any conditions in the time bill, implies no warranty that a train will start at the time at which the passenger is led to expect it, and if the train arrive too late to enable him to make connections and complete a through journey, he cannot recover damages: *Hurst v. Great Western R.W. Co.*, 19 C.B.N.S. 310, and see *Woodgate v. Great Western R.W. Co.*, 1 Times L.R. 133, and *Driver v. London, etc., R.W. Co.*, 16 Times L.R. 293; but where a company issued time bills showing connections with another line after they knew that the connecting train had been discontinued, they were liable, on the ground that the circulation of the time tables amounted to a representation on the company's part that there was a train, which was false to the knowledge of the defendants and was calculated to induce the plaintiff to act as he did: *Denton v. Great Western R.W. Co.*, 5 E. & B. 860. Where a time bill announced that a train would arrive at certain hours and it did not arrive then or within a reasonable time thereafter, the plaintiff was held entitled to recover nominal damages and such other damages of a pecuniary kind as he may really have sustained as a direct consequence of the breach of contract, and that not having communicated to the defendants his desire to connect with another train and to meet his customers in another town he could not recover damages for failure to carry out his purpose: *Hamlin & Great Northern R.W. Co.*, 1 H. & N. 408. This case was discussed in *Hurst v. Great Western R.W. Co.*, 19 C.B.N.S. 310, and it was pointed out by Willes, J. (page 316), that since that case and the case of *Denton v. Great Northern R.W. Co.* (1856), the railway companies have protected themselves by inserting in their time bills a notice to the effect that they do not guarantee the arrival or departure of the train at the exact time stated in the time table, but will do their best to insure punctuality. In *Briggs v. Grand Trunk R.W. Co.*, 24 U.C.R. 510, where plaintiff pleaded the time table as a representation of the arrival and departure of a train on which he desired to travel, it was held on demurrer and without proof of any such clause as was discussed in the *Hurst Case*, that the time table was not to be taken as importing a condition into the contract and that it amounts to a representation only and not to an integral part of the contract. Similarly an advertisement that a train runs from A. to B. so as to correspond with trains from B. to C.

is not a warranty of punctuality, but a mere representation of the intended arrival of the trains: *Lockyer v. International, etc., Co.*, 61 L.J.Q.B. 501. In a time table the defendants stated that "Every attention would be paid to ensure punctuality so far as it is practicable," but that they would not undertake that the trains would arrive or start at the times specified. It was held by a majority of the Court of Common Pleas that the words quoted imported a contract to use due attention to keep the times specified in the time bills so far as practicable having regard to the necessary exigencies of the traffic and circumstances over which the company had no control: *Le Blanche v. London, etc., R.W. Co.*, 1 C.P.D. 287. The case gave rise to a good deal of discussion amongst the judges and it is important here, because the words quoted imposed about the same liability upon the company under the contract as the above section imposes on railway companies in Canada. After the decision in *Le Blanche v. London, etc., R.W. Co.*, the railway companies left out the words quoted and without them the liability of a railway company for the statements contained in its time bills was somewhat modified: *McCartan v. North Eastern R.W. Co.*, 54 L.J.Q.B. 441, and in *Driver v. London, etc., R.W. Co.*, 16 Times L.R. 293, the Court had to consider a condition in a time table which read "The directors give notice that the Company do not undertake that the trains shall start or arrive at the times specified in the bills. . . . The Company will not be accountable for any loss, inconvenience or injury which may arise from delays to or detention of passengers caused by the negligence of the servants of the Company or from any other cause whatsoever." The action based upon this clause was dismissed as no negligence was shown and the question whether the clause was sufficient to relieve the company from damages for delay caused by its negligence was not decided. The point again came up in *Duckworth v. Lancashire, etc., R.W. Co.*, 84 L.T.N.S. 774, where under a condition which provided that the defendants would not under any circumstances be held responsible for delay or detention however occasioned or any consequences arising therefrom, the defendants were absolved from liability even though negligence had been admitted. Lord Alverstone in that case stated that "there is no limit to the conditions which may be imposed by railway companies in regard to passenger traffic." This appears also to be the result arrived

at in an article entitled "Delays to Passengers on Railways," 110 Law Times Journal 212, where the cases are discussed, but it must be remembered that there is no section in the English statutes similar to sec. 214, sub-sec. 3, *supra*, which, in certain cases prohibits railways from entering into contracts relieving them from the consequences of their negligence. The provision for the regularity of the service not now being embodied in sec. 214, it may be that sub-sec. 3 of that section will not apply to damages arising from delay and if that be the case the English decisions would govern.

Delay in Delivering Goods. In the absence of a special contract, the carrier is bound to deliver goods within a reasonable time looking at all the circumstances of the case; but he is not bound, unless he agrees to do so, to deliver them within any certain time and he is not responsible for the consequences of delay arising from causes beyond his control: *Taylor v. Great Northern R.W. Co.*, L.R. 1 C.P. 385. In that case the delay arose owing to an accident due entirely to the negligence of another company having running powers over the same line. A contract to carry by a particular train which usually arrives at a certain hour does not amount to a warranty that a train will so arrive even though the company has been informed that the object of the sender requires that it should do so: *Lord v. Midland R.W. Co.*, L.R. 2 C.P. 339; but the fact that the train arrives several hours after the proper time is *prima facie* evidence of delay in carrying goods and requires explanation from the company: *Roberts v. Midland R.W. Co.*, 25 W.R. 323; and where defendants carried plaintiff's meat in the summer by a train which according to schedule, should have arrived at its destination in two hours, but instead arrived in twenty-four hours, this in the absence of excuse was held to be an unreasonable delay: *Delorme v. Canadian Pacific R.W. Co.*, 11 Leg. News 106, and see *Pontbriand v. Grand Trunk R.W. Co.*, M.L.R. 3 S.C. 61. If the ordinary course of conveyance is departed from owing to the negligence of a servant, this would be evidence of unreasonable delay: *Wren v. Eastern Counties R.W. Co.*, 1 L.T.N.S. 5.

Damages for Delay to Passengers. Where passengers are improperly delayed the principle upon which damages are allowed is "that if one person does not perform his contract, the other may do so for him as reasonably near as may be, and

charge him for the reasonable expense incurred in so doing; and a proper test of what is reasonable in such cases (as the one in question) is to consider, whether, according to the ordinary habits of society, a person delayed on his journey under circumstances for which the company were not responsible would have incurred the expenditure on his own account:” *Le Blanche v. London, etc., R.W. Co.*, 1 C.P.D. 286, and so a person who missed his connection through the fault of defendants in that case was not allowed the cost of a special train by way of damages. Where, however, defendants knew that a miller was bound for the London Corn Market, and failed to punctually run a train which was advertised specially for it, he was allowed both the cost of a special train and damages for losing his market which he failed to reach in time: *Buckmaster v. Great Eastern R. W. Co.*, 23 L.T. 471. Where the delay is no fault of the defendants the cost of a special train will not be allowed: *Fitzgerald v. Midland R.W. Co.*, 34 L.T. 771; *Thompson v. Midland R.W. Co.*, 34 L.T. 34. Where a passenger has been dropped at a place short of his destination the cost of a conveyance to drive him home was allowed: *Great Northern R.W. Co. v. Hawcroft*, 21 L.J.Q.B. 178; or if compelled to sleep elsewhere he might recover his hotel bill: *Hamlin v. Great Northern R.W. Co.*, 1 H. & N. 408; and he may recover something for the inconvenience of having to walk home: *Hobbs v. London, etc., R.W. Co.*, L.R. 10 Q.B. 111, or his wages if he arrives too late for his day’s work: *Cook v. Midland R.W. Co.*, 57 J.P. 388; but nothing for loss of custom if he misses an appointment: *Hamlin v. Great Northern R.W. Co.*, *supra*. If the probable consequence of the delay is to expose a person to inclement weather, and he catches cold and incurs medical expenses, damages for these consequences will be allowed: *Hobbs v. London, etc., R.W. Co.*, *supra*; commented on and discussed *McMahon v. Field*, 7 Q.B. D. 591; *Toronto R.W. Co.*, v. *Grinsted*, 24 S.C.R. 570.

Damages for Delay to Goods. In this as in all other cases the damages recoverable must be such as might reasonably be expected to flow from a breach of the contract to carry in due time, and unless it is shewn that the carrier knew of any special consequences which would flow from delay, they cannot be compelled to pay any unusual damages: *Hadley v. Baxendale*, 9 Exch. 341; and where goods intended for market are delayed, the proper measure of damages is the difference in market price

at the time when they should have arrived and the time when they actually arrived, and, if in addition, they suffered deterioration on account of the delay, damages for that can also be recovered: *Collard v. South Eastern R.W. Co.*, 7 H. & N. 79. Where cloth intended for a cap manufacturer was delayed a month on the road and the season for selling such caps had expired, the plaintiff was allowed as damages the diminution in the value of the cloth on account of the loss of season, but not the loss of anticipated profits, nor the expenses of travellers despatched to sell the caps in expectation of the goods arriving in due time: *Wilson v. Lancashire, etc., R.W. Co.*, 9 C.B. N.S. 633. In *Great Western R.W. Co. v. Redmayne*, L.R. 1 C.P. 29, a traveller was sent to Cardiff to sell goods which were delayed until after he had left, the shipper sued for loss of profits which he would have made on sales by his traveller, but such damages were considered too remote, as the carriers were not aware of the purpose for which they had been shipped; and a traveller who spent three days awaiting goods which were delayed was not allowed his travelling expenses during that period: *Woodger v. Great Western R.W. Co.*, L.R. 2 C.P. 318. In the case of an article delivered to defendants and not forthcoming, it was held that plaintiff could only recover the value of the article and not loss of profits or the wages of workmen employed upon a building intended to receive it: *Ruthven v. Great Western R.W. Co.*, 18 U.C.C.P. 316. Where butter has been detained until a short time before the trial and a tender then made, the plaintiff was allowed as damages the whole value of the property and not merely the difference between the value at the time of detention and its value when tendered, because, under the special circumstances of that case, the tender was wholly illusory: *Brill v. Grand Trunk R.W. Co.*, 20 U.C.C.P. 440.

216. Every employee of the company employed in a passenger train or at a passenger station, shall wear upon his hat or cap a badge, which shall indicate his office, and he shall not, without such badge, be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office, or to interfere with any passenger or his baggage or property. 51 V., c. 29, s. 247.

Before an officer of the railway company can exercise the functions of his office or a conductor can demand a ticket or eject a passenger for non-payment of his fare, this section must be complied with. It has been fully discussed in *Farwell v. Grand Trunk R.W. Co.*, 15 U.C.C.P. 427, in which case A. Wilson, J., after pointing out the benefits to be derived from observing its provisions says at page 442 "To avoid all this difficulty and loss and imposition, for it is as beneficial to the railway companies as it is to the public, it has been provided that the conductors and such like officers shall be provided with a badge of office, that they shall wear this badge in the hat or cap as the most conspicuous part for it to be seen, and that without this badge, the officer shall not exercise his powers nor meddle in any way with the passengers, their baggage or property. No provision could be plainer or more peremptory in its requirements and we must give effect to it, although it may not have been very properly set up in this case by the plaintiff. Its proper observance, however, will be found to be serviceable both to the companies and to the public."

Expulsion on refusal to pay fare.

217. Every passenger who refuses to pay his fare may, by the conductor of the train and the train servants of the company, be expelled from and put out of the train, with his baggage, at any usual stopping place, or near any dwelling house, as the conductor elects, the conductor first stopping the train and using no unnecessary force. 51 V., c. 29, s. 248.

The corresponding but somewhat dissimilar provisions now appear in England in 52 and 53 Viet. c. 57 (Imp.) s. 5.

Legal Effect of Tickets. As a general rule the ticket which an intending passenger buys, is the entire evidence of the contract between him and the carrier, *Great Western R.W. Co. v. Pocock*, 41 L.T.N.S. 415, and it is therefore more than a mere receipt for the fare, though the opinion of Lord Hatherly in *Henderson v. Stevenson*, L.R. 2 Sc. App. 470, leaned to the opposite view. A person who had bought a return ticket from one point to another, attempted, instead of returning to his starting point, to go somewhere else on the ground that the fare was no more than he had paid for his return trip; but the Divisional Court in *Great Western R.W. Co. v. Pocock*, decided that the ticket was evidence of the contract between the parties, and the

purchase of it was limited by its terms and conditions to a certain route only, to which he must strictly conform. In *London, etc., R.W. Co. v. Hinchcliffe* (1903) 2 K.B. 32, we find an instance of other documents beside the ticket and its conditions being incorporated into the contract, for there the railway company's rules contained in its time tables, were held to be also binding on the purchaser. In the notes to section 215, *ante*, other instances are also given of conditions contained in the time tables being treated as part of the contract.

Before considering the binding effect of conditions appearing on tickets from the point of view of contract, it will be well to deal with some points which are of general interest.

Copyright. First, it may be mentioned that under Canadian copyright law, a ticket cannot be made the subject of copyright: *Griffin v. Kingston & Pembroke R.W. Co.*, 17 O.R. 660.

Scalping Tickets. Next, by R.S.C., 1886, chap. 110, secs. 7 and 8, it is a criminal offence in Canada for any one who is not a duly authorized agent to sell any ticket, and by section 9 any one holding an unused ticket or portion of a ticket is entitled to demand a refund for it, and by section 10 any one travelling upon a single journey ticket within the time limited, is entitled to demand from the conductor the privilege of stopping over at any intermediate station, and the time for travelling by it may be extended two days for every fifty miles of the journey to be performed.

Right to Eject. Where a ticket is lawfully demanded, section 217 gives a right to eject a passenger who refuses to pay his fare, or, having lost it, is unable to produce his ticket; provided the latter is put off at a usual stopping place or near a dwelling after the train is stopped; but no unnecessary force may be used. This clause includes the case of a passenger getting on a train without a ticket and declining to pay his fare on the ground that he has not decided how far he is going. The conductor is entitled to know at once where the passenger is going and whether he can pay for his trip, and in the case mentioned, the passenger did not mend matters by declaring his destination when ejected, tendering a \$20 gold piece and demanding the change, less \$1.35, the fare to destination: *Fulton v. Grand Trunk R.W. Co.*, 17 U. C.R. 428; nor is the fact that a passenger had bought a ticket from the agent before starting but had lost it, any excuse for refusing to pay when demand was made by the conductor: *Duke*

v. *Great Western R.W. Co.*, 14 U.C.R. 369 and 377, and in *Beaver v. Grand Trunk R.W. Co.*, 22 O.R. 667, 20 A.R. 476, and *Grand Trunk R.W. Co. v. Beaver*, 22 S.C.R. 498, it was finally decided by the Supreme Court, reversing the Lower Courts, that the contract between the person buying a railway ticket and the company on whose line he is travelling implies that the ticket shall be produced and delivered up to the conductor of the train belonging to the company from which the ticket was purchased, and if he is unable or refuses to so produce and deliver it up he cannot bring an action if ejected.

This distinguishes the Canadian cases from such English authorities as *Butler v. The Manchester & Sheffield R.W. Co.*, 21 Q.B.D. 207, where a passenger was ejected for non-payment of his fare and recovered damages, because under the English statute, failure to produce a ticket only rendered the passenger liable to pay his fare from the nearest station as provided by a by-law of the company duly passed under the authority of a statute.

Under the Act 52 & 53 Viet., cap. 57, sec. 5, already referred to, the English remedy is either to sue the passenger for the amount due, as was done in *London and North Western R.W. Co. v. Hinchcliffe* (1903), 2 K.B. 32; *Great Western R.W. Co. v. Pocock*, 41 L.T.N.S. 415; *Great Northern R.W. Co. v. Palmer* (1895), 1 Q.B. 862; (provided the by-law creates a debt: *London & Brighton R.W. Co. v. Watson*, 4 C.P.D. 118), or to try and convict the delinquent passenger under a by-law of the company duly passed to cover such cases: *Hanks v. Bridman* (1896), 1 Q.B. 253; *Lowe v. Vulp*, *ibid.* 257. The judgment of Mr. Justice Gwynne in the *Beaver Case*, 22 S.C.R., at pp. 501 to 508, treats this subject exhaustively, and the decision was followed in *Taylor v. Grand Trunk R.W. Co.*, 2 Can. Ry. Cas. 99; but if the conductor ejects a passenger who presents a ticket or offers to pay his fare, the railway company is liable for the conductor's acts: *Curtis v. Grand Trunk R.W. Co.*, 12 U.C.C.P. 89; *Dancey v. Grand Trunk R.W. Co.*, 20 O.R. 603, 19 A.R. 664; but where the ejection was wrongful but the conductor acted *bonâ fide*, and the inconvenience resulting was trifling, a verdict of £50 was deemed to be excessive and a new trial was granted on this account: *Huntsman v. Great Western R.W. Co.*, 20 U.C.R. 24; and where there were no circumstances of aggravation, though the ejection was found to be unlawful, a new trial was granted

unless the plaintiff would accept \$500 instead of \$1,000 awarded by the jury: *Dancey v. Grand Trunk R.W. Co.*, 19 A.R. 664. This case decides that the rule in some of the American Courts that a passenger must not resist a wrongful demand for his fare, but rather leave the train of his own accord and seek his remedy in the courts, is not in force in Ontario.

Conditions on Ticket. Subject to the statutory restrictions upon the freedom of contract, dealt with in notes to section 214, *ante*, the terms contained in a ticket are binding upon the passenger using it if he knew of them or had means of knowledge; and if he had such means of knowledge but did not avail himself of them to find out what he was agreeing to, he is nevertheless bound. On this ground, where the terms of a ticket were plainly printed across its face, and the passenger knew there was printing upon the ticket but did not read it, his failing to do so afforded no defence: *Coombs v. The Queen*, 4 Ex. C.R. 321, 26 S.C.R. 13; *Craig v. Great Western R.W. Co.*, 24 U.C.R. 504; *Cunningham v. Grand Trunk R.W. Co.*, 9 L.C. Jur. 57, 11 L.C. Jur. 107, and see the cases cited in *Taylor v. Grand Trunk R.W. Co.*, *supra*; but where the conditions are not printed so that they will be necessarily brought to the attention of the passenger if he reads his ticket, as when they are printed on the back and no reference is made to them on the front of the ticket, they will not bind the purchaser: *Henderson v. Stevenson*, L.R. 2 Sc. App. 470; though, where on the face of the ticket appears the words "see back," the passenger was bound by conditions on the back, provided at least that the company did that which was reasonably sufficient to give the plaintiff notice of the condition: *Parker v. South Eastern R.W. Co.*, L.R. 1 C.P.D. 618, 2 C.P.D. 416; *Harris v. Great Western R.W. Co.*, 1 Q.B.D. 515; and where on the inside cover of a book of coupon tickets was printed a condition not referred to on the outside but apparent at once on turning the cover, it was held that the whole book was the contract, and the plaintiff could not accept it without accepting also the condition which was part of the book: *Burke v. South Eastern R.W. Co.*, 5 C.P.D. 1; see also *Watkins v. Rymill*, 10 Q.B.D. 178, where the plaintiff was held bound by conditions prominently exhibited in the form of a notice upon the premises where he accepted a receipt on which was printed "subject to the conditions as exhibited upon the premises." Where, owing to defective eyesight or other infirmity, or owing to lack of edu-

cation, the passenger is not able to learn what is on his ticket, and the carrier takes no pains to inform him, the conditions will not be binding: *Bate v. Canadian Pacific R.W. Co.*, 14 O.R. 625, 15 A.R. 388, 18 S.C.R. 697; *Richardson v. Rountree* (1894), A.C. 217. Many of the cases were recently discussed in the Supreme Court in *Provident Savings Society v. Mowat*, 32 S.C.R. 147, at pages 161 and 166, and at page 167 the following statement of law in *New York Life Assurance Company v. Mac-Master*, 87 Fed. R. 63, was quoted and adopted: "If one can read his contract, his failure to do so is such gross negligence that it conclusively estops him from denying knowledge of its contents unless he was dissuaded from reading it by some trick, artifice or fraud of some other party to the agreement." The conditions upon a railway ticket were considered in *Taylor v. Grand Trunk R.W. Co.*, 2 Can. Ry. Cas. 99, which was a case where plaintiff purchased an excursion ticket from Indian Head, N.W.T., to Toronto and return, one of the conditions, which he signed, being that he should identify himself to the authorized agent of the railway in Toronto before he set out on his return journey, and obtain the agent's official signature, dated and stamped at Toronto. On production of his ticket he secured his sleeping berth, had his baggage checked, and was admitted to the train and started on his return journey, but neglected to identify himself as required and was put off the train, after he had refused to pay his fare, although he offered to identify himself to the conductor, and it was held that he could not recover. In *Jones v. Grand Trunk R.W. Co.*, 3 O.W.R. 706, the eviction of a lady holding a second-class ticket, because she would not go from a first-class car to a smoking-car, which was the only second-class car on the train, was considered improper. This judgment was affirmed by the Court of Appeal on April 12th, 1905. In *Delahanty v. Michigan Central R.W. Co.*, 3 Can. Ry. Cas. 311, the deceased was a passenger on the defendants' train from Detroit to Buffalo. Between Detroit and Bridgeburg he drank heavily, and when near Bridgeburg began to annoy passengers, and the conductor compelled him to leave the train at that station, which was 700 feet from the end of the International Railway Bridge over the Niagara River, and the deceased, who was not given into charge of any body, being intoxicated, strayed after the train, on which his luggage remained, and fell over the bridge and was drowned. It would have been easy to have taken

care of deceased and to have prevented him interfering with the passengers. At Bridgeburg the train was only 5 minutes' run from the City of Black Rock, and only 20 minutes' run from Buffalo, its destination. Upon these facts, Britton, J. (with a jury) held that the defendants were liable, inasmuch as the act of the deceased was what it might reasonably be expected that a man in his condition would do upon being put off the train when and where he was put off, and that the damages were not too remote.

218. No person injured while on the platform of a car, or on any baggage, or freight car, in violation of the printed regulations posted up at the time, shall have any claim in respect of the injury, if room inside of the passenger cars, sufficient for the proper accommodation of the passengers, was furnished at the time. 51 V., c. 29, s. 249. No claim for injuries in certain cases.

By section 243 (f), *infra*, the company may make by-laws, rules and regulations respecting the travelling upon, or the using or working of the railway. The effect of such by-laws and the essentials to their validity will be dealt with in the notes to that section, but the following cases arising out of persons riding on unauthorized conveyances or in unauthorized portions of the trains, may be useful.

Construction Train. Plaintiff was a servant of one of defendants' contractors, and was injured while travelling on a construction train on his return from work. A verdict in favour of the plaintiff was upheld on appeal, on the ground that while the defendants allowed their carriages to be employed in carrying the men back and forth to work, it was their duty to see that they were carried with reasonable care: *Torpy v. Grand Trunk R.W. Co.*, 20 U.C.R. 446. Where, however, a workman employed by defendants' contractors was travelling on a construction train furnished by defendants for the transportation of *materials only*, he was not permitted to recover damages for injuries due to the negligence of defendants' servants, even though the conductor had, without authority, however, allowed him to travel on it: *Graham v. Toronto, Grey and Bruce R.W. Co.*, 23 U.C.C.P. 541. If the agreement is to carry a contractor's workmen and materials during construction, the defendants will be liable for the

negligence of their servants, who will not be considered fellow-servants of the plaintiff: *Sheerman v. Toronto, Grey and Bruce R.W. Co.*, 34 U.C.R. 451.

Locomotive. The conductor of a special freight train was travelling on an engine contrary to the defendants' rules. He was killed in a collision, and upon action brought by his administratrix, a nonsuit was granted, which was upheld in appeal: *Stoker v. Welland R.W. Co.*, 13 U.C.C.P. 386.

A contractor of defendants was riding to his work on one of their engines with the knowledge and permission of the engineer, who, however, had no authority to allow it. The full Court in British Columbia reversed a verdict in favour of the plaintiff, holding that the deceased was a mere licensee and there was no evidence of gross negligence on the part of defendants: *Nightingale v. Union Colliery Co.*, 2 Can. Ry. Cas. 47; affirmed by the Supreme Court of Canada, 35 S.C.R. 65. With this decision should be compared the case of *Harris v. Perry* (1903), 2 K.B. 219, where, under somewhat similar circumstances, a finding of the jury that the plaintiff was on the engine with the defendants' permission, and that the latter had not used due care towards him, was upheld.

Baggage Car. Plaintiff, who was travelling on a passenger ticket, entered the baggage car, where people frequently went to smoke, the conductor passed him twice and made no objection. It was shown that the notice required by this section was generally posted up in the car, but it was not clearly proved that it was there when plaintiff was in the car. Owing to a collision the plaintiff's arm was broken, though no one in the passenger coaches was hurt. The jury having found in his favour, the verdict was upheld, it being held that under the circumstances the exemption granted by the statute where notices are posted up, did not apply, as persons were allowed in this car to smoke, and the conductor had made no objection to the plaintiff's presence there: *Watson v. Northern R.W. Co.*, 24 U.C.R. 98.

Express Messenger. Deceased was an employee of the American Express Company, travelling on defendants' train pursuant to an agreement between his employers and the defendants. He was killed owing to the negligence of the defendants. It was held that he was in effect a passenger, and entitled to the same degree of care, and that his administratrix could recover: *Jennings v. Grand Trunk R.W. Co.*, 15 A.R. 477, 13 A.C. 800.

Freight Car. Plaintiff was travelling in a caboose in charge of cattle. He stood up while shunting was being done and was hurt. Defendants' servants did not know that he had entered the car. A nonsuit granted at the trial was upheld, as no negligence was proved, and it was considered that plaintiff was himself negligent in standing up when he knew that shunting was to be done, and that he could not expect the same degree of care upon a freight train as on a passenger train: *Hutchinson v. Canadian Pacific R.W. Co.*, 17 O.R. 347, 16 A.R. 429.

Platform. A newsboy riding on a platform which had a defective step, in some unexplained way fell off and was killed. He was held to be a mere licensee, bound to take the platform as he found it, and his representatives could not recover: *Blackmore v. Toronto Street R.W. Co.*, 38 U.C.R. 172; but a person unable to get into a car which was greatly crowded, and forced therefore to sit on the second step of the platform, where he was injured, was allowed damages for such injuries: *Burris v. Pere Marquette R.W. Co.*, 4 O.W.R. 510.

219. No passenger train shall have any freight, merchandise or lumber car in the rear of any passenger car in which any passenger is carried 51 V., c. 29, s. 245, Am. Position of passenger cars.

2. Every officer or employee of any company, who directs, or knowingly permits, any freight, merchandise, or lumber car, to be so placed, is guilty of an indictable offence. 51 V., c. 29, s. 291, Am. Penalty for violation.

The first part of this section is taken from section 245 of the Act of 1888, which read, "no baggage, freight, merchandise or lumber cars shall be placed in rear of the passenger cars." As now enacted, there is nothing to prevent a train being made up with a baggage car in the middle, the rear, or elsewhere. The section, of course, is aimed at mixed trains, in which both passenger and freight cars appear.

Sub-section 2 is taken from section 291 of the Act of 1888, which provides that "every officer or servant of any company, or any person employed by it, who directs or knowingly permits any baggage, freight, merchandise or lumber car to be placed in rear of the passenger cars, is guilty of a misdemeanour."

It is to be observed that, as reconstituted, this section creates a criminal offence; it may be a question, therefore, whether any civil remedy is given by the statute, though, apart from the statute, such an improper arrangement of the cars might of itself be evidence of negligence, if an accident could be traced to it.

Baggage
checks.

220. A check shall be affixed by the company to every parcel of baggage, having a handle, loop or suitable means for attaching a check thereupon, delivered by a passenger to the company for transport, and a duplicate of such check shall be given to the passenger delivering the same. 51 V., c. 29, s. 250, Am.

Excess
baggage.

2. In the case of excess baggage, the company shall be entitled to collect from the passenger, before affixing any such check, the toll authorized under this Act.

Liability
for re-
fusing to
check
baggage.

3. If such check is improperly refused on demand, the company shall be liable to such passenger for the sum of eight dollars, which shall be recoverable in a civil action. 51 V., c. 29, s. 251, Am.

Changes Effected. Section 250 of the Act of 1888 differed in wording, but not in its effect, from sub-section 1 of this section; sub-section 2 is entirely new, and sub-section 3 omits a provision contained in section 251 of the former Act, which required that "no fare or toll shall be collected or received from such passenger, and if he has paid his fare, the same shall be refunded by the conductor in charge of the train."

The former Act also contained a section (section 252) permitting a person who produces a check, to give evidence on his own behalf proving the contents and value of any baggage not delivered to him. This may have been useful when parties to an action were not competent witnesses in their own behalf, but has become entirely unnecessary now that the rule to that effect has been abolished.

Checks. The system of checking baggage, while it exists in Canada under the present statute, and in the United States: *Meux v. Great Eastern R.W. Co.*, 2 Am. & Eng. Ry. Cas. (N.S.)

464, and notes, does not exist in England, and the difference between the practice in the two countries is described by Draper, C.J., in *Gamble v. Great Western R.W. Co.*, 24 U.C.R. 407, at p. 413. The majority of the Court in that case considered that our system did not alter the character of the responsibility as it existed under the English cases, and they looked upon checks "only as additional precautions taken by the company beyond what is customary in England in order to prevent the baggage from being given up to the wrong person." From this view, Morrison, J., dissented, considering that the system of checking is in fact "a notice to passengers that all articles of luggage which they do not desire or prefer to keep under their own personal care and at their own risk, must be checked or handed to the company's officers."

The view of the majority of the Court was, however, upheld on appeal: 3 Error and Appeal, 163. Checks are, nevertheless, evidence that the baggage has been received by the carrier, and lays upon him the onus of showing that it has not been received: 3 Wood on Railways, p. 403; but it is not conclusive against him, and he may tender evidence to show, that, notwithstanding the possession of the check, the holder has received the article sued for: *Stimpson v. New England, etc., Steamship Co.*, 3 Geld & Oxley (Nova Scotia) 184. Where, in the course of a continuous journey, a passenger gave up his check to an omnibus agent who was to transport him across Buffalo in order to reach another train, by which he was to complete his journey, and the conductor had told him that this was the proper course, he was permitted to recover from the company issuing the check the value of his baggage which was lost by the omnibus line: *Smith v. Grand Trunk R.W. Co.*, 35 U.C.R. 547.

Nature of Liability. The company are common carriers, and liable as such when they undertake to carry a passenger and his personal luggage for hire: *Macrow v. Great Western R.W. Co.*, L.R. 6 Q.B. 612; *Cohen v. South Eastern R.W. Co.*, 2 Ex. D. 253; 259; *Gamble v. Great Western R.W. Co.*, 24 U.C.R. 407; 3 Error and Appeal, p. 163; but where the passenger, instead of delivering his baggage to the company to be checked and carried in the baggage car, retains it in his own possession at his own request, "the company are not liable for any loss or injury occurring during its transit to which the act or default of the passenger has been contributory:" *Great Western R.W. Co. v. Bunch*, 13

A.C. 31. If, however, the baggage retained by the passenger is lost, not through his own neglect but through the carelessness of a railway porter who has undertaken to watch it, the plaintiff may recover on the ground of the defendants' negligence: *Great Western R.W. Co. v. Bunch*, *supra*, disapproving of the reasoning in *Bergheim v. Great Eastern R.W. Co.*, 3 C.P.D. 221, to the contrary. The rule laid down in the *Bunch Case* was applied in *Gamble v. Great Western R.W. Co.*, *supra*; but in an American case, where the passenger had taken his overcoat into a car with him and lost it, the Court held that "the overcoat was not delivered into the possession or custody of the defendants, which is essential to their liability as carriers:" *Tower v. Utica, etc., R.W. Co.*, 7 Hill (N.Y.) 47; and in Quebec, where an overcoat carried by a passenger on a steamboat, was left by him in the saloon while he was at his supper and was lost, the carrier was excused, and *Gamble v. Great Western R.W. Co.* was distinguished: *Torrance v. Richelieu & Ontario, etc., Co.*, 10 L.C. Jur. 335.

Limitation of Liability. The railway companies being common carriers of luggage, may limit their liability to the extent which may be permitted by statute. This subject has been dealt with fully in the notes to section 214, *ante*, and the section itself should be consulted in considering how far a railway company can escape liability for loss of luggage due to its own negligence.

Any conditions imposed upon the passenger by a ticket or other contract must be known to him, and where an old lady, whose eyesight was defective, sought to recover damages for lost luggage, despite conditions upon her ticket, limiting the company's liability, the Supreme Court held, reversing the lower courts, that she was not bound by conditions, which in fact had not come to her knowledge: *Bate v. Canadian Pacific R.W. Co.*, 18 S.C.R. 697, reversing the decisions reported in 14 O.R. 625, and 15 A.R. 388. Under section 246 of the Act of 1888, it would appear that a railway company could at least limit its liability to a stated sum: *Robertson v. Grand Trunk R.W. Co.*, 24 S.C.R. 611. Where railways undertake to keep baggage in a cloak-room till required, and exact no conditions limiting their responsibility, they will be liable as bailees for the full value of goods lost through their negligence; but, *semble*, they would not be bound by section 214 of this Act, and being mere bailees, might by contract undertake to keep articles till called for, and yet

provide that they shall assume no liability, or only a limited liability therefor: *Pratt v. South Eastern R.W. Co.* (1897), 1 Q.B. 718; *Harris v. Great Western R.W. Co.*, 1 Q.B.D. 515.

Railway companies sometimes carry goods and passengers by water, and in such cases section 214, *ante*, may not apply: *Abdou v. Canadian Pacific R.W. Co.*, 4 Can. Ry. Cas. 56. By R.S.C., cap. 82, provision is made for regulating the liability of carriers by water, and by section 3 of that statute it is provided that such carriers shall be liable for loss of or damage to personal baggage of passengers carried on their vessels, but that such liability shall not exceed \$500 unless the true value of the goods is declared. By virtue of this section, a condition in a contract made with shipowners limiting liability for personal baggage to \$100 was disregarded, and judgment was given for \$500, the goods themselves being worth \$655: *Wensky v. Canadian Development Co.*, 8 B.C.R. 190.

When Liability Begins. The liability of the company begins when the baggage is delivered to its servants for the journey, though the train may not start for a considerable time: *Lovell v. London, etc., R.W. Co.*, 45 L.J.Q.B. 476; and where luggage is left with a porter to be placed in plaintiff's compartment and is lost before being put on board, the defendants are liable if the circumstances show that it was entrusted to the porter for the purposes of transit, and was not merely being taken care of by him while the journey was suspended: *Bunch v. Great Western R.W. Co.*, 17 Q.B.D. 215, 13 A.C. 31; *Welch v. London, etc., R.W. Co.*, 34 W.R. 166.

Where a person in charge during the temporary absence of the proper officer receives baggage from an intending passenger on board a vessel, the vessel owners become liable: *Morrison v. Richelieu, etc., Co.*, 5 L.N. 71; and in a somewhat similar case, where the defendants' police officer received baggage several hours before the train started, the plaintiff recovered its value: *Tessier v. Grand Trunk R.W. Co.*, 3 Rev. Leg. 31.

When Liability Ceases. Generally a railway company's duty as common carrier of luggage ceases when it has been placed on the platform and the owner has had a reasonable time to remove it: *Penton v. Grand Trunk R.W. Co.*, 28 U.C.R. 367; and it is the owner's duty to call for his baggage within a reasonable time, and if he deliberately leaves it with the company till the next day to suit his own convenience, the company would be no

longer liable as common carriers, but the plaintiff's claim, if any, would be against the defendants as bailees or warehousemen only, and they would not be liable unless negligence is shown: *Vineberg v. Grand Trunk R.W. Co.*, 13 A.R. 93. If instead of leaving the luggage on the platform to be taken away by the owner, the carrier provides porters to take it to the vehicle which conveys it away, his liability lasts till the porters have performed their duty: *Patscheider v. Great Western R.W. Co.*, 3 Ex. D. 153; *Richards v. London, etc., R.W. Co.*, 7 C.B. 839. If, in England, a porter takes charge of the luggage while the owner goes away, intending to send for it, the company's liability is at an end: *Hodkinson v. London, etc., R.W. Co.*, 14 Q.B.D. 228; and where, instead of complying with the company's by-laws and leaving his luggage in the cloak room till called for, the passenger left it in charge of a porter to be sent after him in an omnibus, he could not recover: *Smith v. Great Western R.W. Co.*, 62 L.T. 404; and in Manitoba the railway company successfully defended an action for baggage which had been deposited at the station at which the passenger alighted, but not being claimed by him in due time, had been lost, and it was considered that, as the defendants had not charged storage and were not entitled to charge it, they were not liable as warehousemen: *McCaffrey v. Canadian Pacific R.W. Co.*, 1 Man. L.R. 350. The "reasonable time" to be given to the passenger for taking away his baggage depends upon circumstances, such as the quantity of baggage, the number of people demanding baggage, and the facilities afforded for handling it: *Abbott on Railways*, p. 353; *Hogan v. Grand Trunk R.W. Co.*, 2 Q.L.R. 142; *Kellert v. Grand Trunk R.W. Co.*, 22 L.C. Jur. 257. While the law in Quebec under these cases appears to be substantially similar to the law in Ontario and Manitoba under the *Penton*, *Vineberg*, and *McCaffrey* cases, the more recent decision of *Pellant v. Canadian Pacific R.W. Co.*, Mont. L.R. 7 S.C. 131, Q.R. 1 Q.B. 311, appears to extend their liability for baggage which has been left unclaimed for over twenty-four hours. For a discussion of this case, see *Abbott on Railways*, pp. 356, 357. Where a steamship company undertook to keep its passengers' baggage until it was examined by the Customs authorities, the contract of carriage is not ended until the examination is completed and a reasonable time thereafter has elapsed to enable the owner to claim his goods: *Davidson v. Canadian Shipping Co.*, 19 Rev. Leg. 558, Q.R. 1 Q.B. 298.

Sleeping Car Companies. There are many cases in the United States in which the liability of these companies for goods lost while on their cars has been considered. Some of them are collected in an article on the liability for passengers' luggage in 2 Am. & Eng. Ry. Cas. (N.S.) 1, and the subject is dealt with at some length in Abbott on Railways, pp. 357, *et seq.* If the passenger is awake and sitting up, able to look after his own effects, there would apparently be no difference between the case of a parlour car company and any other company, and the rule enunciated in *Great Western R.W. Co. v. Bunch*, 13 A.C. 31, which has already been dealt with, would govern: *Whitney v. Pullman Car Co.*, 143 Mass. 243; but where a sleeping car company invites persons to come in and go to sleep, thus rendering themselves incapable of taking care of their own property, different considerations apply, for "when you have gone to sleep, of course, you can't take care of yourself. Everybody knows that, and for that very reason, and the fact that the company notifies you to lie down and shut your eyes and go to sleep, and thus become helpless, it is their duty to take care of you while you do sleep; not that they are insurers, not that they say you shall not be robbed, but that they will use reasonable and ordinary care to prevent people intruding upon you and picking your pockets or carrying off your clothes while you are asleep." *Pullman Car Co. v. Gardner*, 3 Pennypacker (Penn.) 78; Albany Law Journal, 1884, pp. 8 and 9. It is the duty of such a company to keep a person on guard all night: *Pullman Car Co. v. Law*, 30 Cent. L.J. 345; *Carpenter v. New York, etc., R.W. Co.*, 124 N.Y. 53. These decisions have been followed and approved in Ontario in *Stearn v. Pullman Car Co.*, 8 O.R. 171, which, however, decided that where a passenger on defendants' cars, before going to sleep, put his pocket book under his pillow and in the morning it was gone, he could not, without proving some negligence on defendants' part, recover, as they were not liable as insurers, and in any case it could hardly be said that there was any delivery of the pocket book into their custody. In the cases already quoted an attempt has been made to impose upon sleeping car companies the same liability as innkeepers, but this has generally failed. In Quebec, however, in *Sise v. Pullman Car Co.*, Q.R. 1 S.C. 9, the trial judge considered that they were innkeepers and subject to the liability imposed by Quebec law upon that class of bailees; but, on appeal, the Court of Queen's Bench

held that there was evidence of negligence, and on that ground affirmed the Superior Court judgment, without expressing any opinion upon their status: *Pullman Car Co. v. Sise*, Q.R. 3 Q.B. 258.

Who May Sue. If a servant carries his master's livery in his luggage, even though the contract to carry him and his luggage is with him and not with the master, yet the latter may sue for damages done to such livery or to other personal baggage lawfully on the railway premises or trains when lost: *Meux v. Great Eastern R.W. Co.* (1895), 2 Q.B. 387; and a servant whose fare has been paid by his master, may sue for damages to his personal baggage which he is carrying with him: *Marshall v. York, etc., R. W. Co.*, 11 C.B. 655; and an officer who is carried under a contract with the Government may sue for the loss of his effects: *Martin v. Great Indian, etc., R.W. Co.*, L.R. 3 Ex. 9; but a person who sends his own luggage upon a ticket bought by the servant, cannot recover, because the liability is, subject to what has been already said, only to the passenger whose luggage it appears to be: *Becher v. Great Eastern R.W. Co.*, L.R. 5 Q.B. 241.

What Constitutes Baggage. Railway companies are only bound to check and carry free passenger's *luggage*, and are only liable for such articles so carried and lost or damaged as are properly comprehended in that term. In *Great Northern R.W. Co. v. Shepherd*, 8 Ex. 30, a case where ivory handles, intended for sale, had been carried and lost, Parke, B., says, p. 37: "In this case, there being no special contract, the defendants were bound to carry the plaintiff and his *luggage*, which term, according to the true modern doctrine on the subject, comprises clothing and such articles as a traveller usually carries with him for his personal convenience, perhaps even a small present or a book for his journey might be included in the term; but certainly not merchandise or material bought for the purpose of being manufactured and sold at a profit." This case was followed in *Shaw v. Grand Trunk R.W. Co.*, 7 U.C.C.P. 493, where it was said that though articles carried for convenience or amusement, such as a gun or fishing tackle, might fall within the term, a quantity of gold pens and pencils intended for sale would not be included. If it can be shown, however, that the company actually knew the character of the goods tendered as baggage, and accepted them with such knowledge, they would be liable for

their loss: *Great Northern R.W. Co. v. Shepherd*, *supra*. It is not enough to show that there was some indication on the parcel or trunk from which the character of the goods could be inferred, as where a trunk was of a particular kind known as a commercial traveller's trunk, nevertheless the company was not liable: *Packard v. Canadian Pacific R.W. Co.*, Mont. L.R. 5 S.C. 64; or where a parcel tendered as baggage was labelled "glass:" *Cahill v. London, etc., Co.*, 13 C.B.N.S. 813; or rare plants intended for sale were marked "plants, perishable:" *Lee v. Grand Trunk R.W. Co.*, 36 U.C.R. 350. It follows from what has been said, that a commercial traveller's samples carried in trunks will not be treated as baggage unless the company, knowing what it contains, allows it to be carried free: *Canadian Navigation Co. v. Hayes*, 19 L.C. Jur. 269; but a hamper containing provisions intended as a present was held to be personal baggage: *Case v. London, etc., R.W. Co.*, Law Jo. Jan. 3, 1880, p. 9. The following articles are not baggage: Merchandise: *Belfast, etc., R.W. Co. v. Keys*, 9 H.L. 556, and other cases. Deeds and money belonging to a client, carried by a solicitor: *Phelps v. London, etc., R.W. Co.*, 19 C.B.N.S. 321, and see *Thomas v. Great Western R.W. Co.*, 14 U.C.R. 389. Sheets, blankets and quilts: *Macrow v. Great Western R.W. Co.*, L.R. 6 Q.B. 612; *McCaffrey v. Canadian Pacific R.W. Co.*, 1 Man. L.R. 350. An artist's pencil sketches: *Mytton v. Midland R.W. Co.*, 28 L.J. Ex. 385. An invalid chair: *Cusack v. London, etc., R.W. Co.*, 7 Times L.R. 452. A bicycle: *Britten v. Great Northern R.W. Co.* (1899), 1 Q.B. 243; but see *Gormully v. Midland R.W. Co.*, 14 Times L.R. 81. A concertina, rifle, revolver, sewing machine and carpenter's tools: *Bruty v. Grand Trunk R.W. Co.*, 32 U.C.R. 66.

The following articles were held to be baggage: Two gold chains, a locket, two gold rings and a silver pencil case: *Bruty v. Grand Trunk R.W. Co.* A quantity of jewellery suitable to the passenger's station in life: *Woodward v. Allan*, 1 L.N. 458. Money sufficient for travelling expenses: *Merrill v. Grinnell*, 30 N.Y. 594. Silk dresses, petticoats, children's clothing and an opera glass: *McCaffrey v. Canadian Pacific R.W. Co.*, 1 Man. L.R. 350. A dressing case, night glasses, and telescope, owned by a shipmaster: *Cadwallader v. Grand Trunk R.W. Co.*, 9 L.

C.R. 169; but a woman's dresses in a man's trunk were not allowed as luggage: *Mississippi, etc., R.W. Co. v. Kennedy*, 41 Miss. 671; nor a man's clothes in a lady's trunk carried for her only: *McCaffrey v. Canadian Pacific R.W. Co., supra*.

Transportation of dangerous goods.

Nature must be marked on outside.

Notice.

Penalty.

221. No passenger shall carry, nor shall the company be required to carry upon its railway, gunpowder, dynamite, nitro-glycerine, or any other goods which are of a dangerous or explosive nature; and every person who sends by the railway any such goods without distinctly marking their nature on the outside of the package containing the same, and otherwise giving notice in writing to the station agent or employee of the company whose duty it is to receive such goods and to whom the same are delivered, or who carries or takes upon any train any such goods, for the purpose of carriage shall forfeit to the company the sum of five hundred dollars for every such offence. 51 V., c. 29, s. 253, Am.

The first part of the section in the Act of 1888 read: "No passenger shall carry, or require the company to carry upon its railway, *aquafortis or oil of vitriol*, gunpowder, nitro-glycerine, or any other goods which, *in the judgment of the company*, are of a dangerous nature; and every person who sends by the railway any such goods, etc." It will be observed that "the judgment of the company" is no longer to be the test of what is dangerous and the result must be that a company claiming the penalty provided by the section must satisfy the Court or a jury that they are of a kind prohibited by this section. Somewhat similar, but more elaborate legislation exists in England under 38 Vict., cap. 17, secs. 35, 36 and 37.

Apart from statute it was held by a majority of the Court in *Brass v. Mailland*, 6 E. & B. 470, that there is an implied undertaking on the part of shippers of goods, that they will not deliver packages of a dangerous nature, the character of which the carrier's servants may not reasonably be expected to know and if they do so they will be liable to the carrier for any damages which he may have to pay other shippers on account of injury done to their goods by the dangerous article. At common law, at least, such want of knowledge would not relieve a carrier of goods from liability to other shippers whose

goods were injured, but he is left to his remedy over: *Brass v. Maitland*, *supra*. As a carrier of passengers is only liable for negligence and is not an insurer, he would not, however, be liable for an accident due to explosives carried into a car by another passenger without his knowledge and in the absence of circumstances which ought to have aroused his suspicion: *East Indian R.W. Co. v. Kalidas* (1901), A.C. 396. Where the defendant by his agent delivered a carboy of nitric acid to the plaintiff for carriage and the agent failed to disclose its dangerous character, the plaintiff was allowed damages caused by the carboy breaking and the acid injuring him: *Farrant v. Barnes*, 11 C.B.N.S. 555. In that case, Willes, J., at p. 563, says: "I apprehend that as a matter of legal duty a person who gives another dangerous goods to carry, goods which require more care and caution than ordinary merchandise and which are likely in the absence of such caution to injure persons handling them, is bound to give notice of their dangerous character to the party employed to carry them, and is liable for the consequences which are likely to ensue from the omission to give such a notice;" see also *Hearn v. Gaston*, 28 L.J. Mag. Cas. 216. These doctrines were applied to a case of a shipowner carrying contraband goods and the Court of Appeal in England laid it down that "the carriage by a shipowner of goods destined for an alien enemy without the knowledge and consent of the other shippers is a breach of duty toward them, and the shipowner is liable for damages for delay in delivering their goods at the port of destination, if the ship is seized and detained by reason of having enemies' goods on board": *Dunn v. Bucknall* (1902), 2 K.B. 614.

222. The company may refuse to take any package or parcel which it suspects to contain goods of a dangerous nature, or ^{Company} may require the same to be opened to ascertain the fact; and ^{may re-} ^{Company} ^{refuse to} ^{carry.} the company shall not carry any such goods of a dangerous nature, except in cars specially designated for that purpose, on ^{Carriage} each side of each of which shall plainly appear in large letters ^{of such} ^{goods.} the words "dangerous explosives"; and for each neglect to comply with the provisions of this section, the company shall incur ^{Penalty.} a penalty of five hundred dollars. 51 V., c. 29, s. 254.

See notes to sec. 221, *ante*.

Trains to
stop at
swing
bridges.

223. When any railway passes over any navigable water, or canal, by means of a draw or swing bridge which is subject to be opened for navigation, every train shall, before coming on or crossing over such bridge, be brought to a full stop and shall not proceed until a proper signal has been given for that purpose, and in default the company shall be liable to a penalty not exceeding four hundred dollars. Any employee failing to comply with the rules of the company as to compliance with the provisions of this sub-section shall be liable to the like penalty, or to six months' imprisonment, or to both. 51 V., c. 29, s. 255, Am.

Where
safety
devices
installed
Board
may
otherwise
order.

2. Wherever there is adopted or in use on any railway at any such bridge, an interlocking switch and signal system, or other device which, in the opinion of the Board, renders it safe to permit engines and trains to pass over such bridge without being brought to a stop, the Board may, by order, permit engines and trains to pass over such bridge without stopping, under such regulations, as to speed and other matters, as the Board deems proper. 55-56 V., c. 27, s. 7, Am.

By the former section trains were compelled to stop for one minute before crossing a swing bridge. It is now provided that they must stop and not proceed until a proper signal has been given.

The introduction of interlocking and derailling devices rendered possible the enactment of 55-56 Vict., cap. 27, sec. 7, and this has been re-enacted with certain changes, as sub-section 2 of this section. Section 179, *ante*, provides that no railway company shall obstruct navigable waters and therefore where they cross such waters swing or draw bridges are necessary, and the above section becomes applicable.

Use of
bell and
whistle.

224. When any train is approaching a highway crossing at rail-level (except within the limits of cities or towns where the municipal authority may pass by-laws prohibiting the same), the engine whistle shall be sounded at least eighty rods before reaching such crossing, and then the bell shall be rung con-

tinuously until the engine has crossed such highway; and the company shall, for each neglect to comply with the provisions of this section, incur a penalty of eight dollars, and shall also be liable for all damage sustained by any person by reason of such neglect; and every employee of the company who neglects to comply with this section shall for each offence be subject to a like penalty. 51 V., c. 29, s. 256, Am.

The first part of this section formerly read: "The bell, with which the engine is furnished, shall be rung, or the whistle sounded, at the distance of at least eighty rods from every place at which the railway crosses any highway, and be kept ringing or be sounded at short intervals, until the engine has crossed such highway."

It is important to note that provision is now made for cities or towns passing by-laws prohibiting whistling within their limits. Such by-laws have frequently been passed; but as the provision of the former Railway Act required the use of whistles, it was difficult to set up a municipal ordinance in contravention of the express provisions of a statute having sole power to legislate for Federal railways. Under the earlier statute also the bell was required to be rung *or* the whistle sounded; whereas, under the present Act both signals are required, though both need not be continuously employed until the crossing has been reached.

Section 213 requires every locomotive to be equipped with a bell weighing at least thirty pounds.

Signals at Common Law. The section now under consideration is the foundation for most of the actions for damages suffered from collision with trains at highway crossings but a question arises whether the company must, apart from statute furnish protection by signals or otherwise at crossings which a jury should consider peculiarly dangerous. In other words there may be a liability at common law apart from any question of failure to give the statutory warnings. For instance, in *Hollinger v. Canadian Pacific R.W. Co.*, 20 A.R. 244, the late Sir George Burton stated that though there was no duty on the part of the railway company to give the statutory warnings while shunting, they had no right to lay sidings across a highway, and that an accident having occurred on a siding where it

crossed a street, the railway company was liable on the ground that there was an unauthorized use of the public highway. This was a dissenting judgment, and may not be a correct view of the law (see 21 Canadian Law Times at p. 477), but it illustrates the point that there may be a liability apart from statute. In *Lett v. St. Lawrence and Ottawa R.W. Co.*, 1 O.R. 545, the jury found that the scene of the accident was an unusually dangerous crossing, and that in addition to a failure to give the statutory signals, there was not a man on the rear end of the car, which was moving reversely, and that there was not a sufficient signboard. A verdict was given for the plaintiffs. This verdict was objected to on the ground that other requirements than those prescribed by the statute were exacted, but the verdict was sustained. The case is also reported in 11 A.R. 1 and 11 S.C.R. 422, but the judgments there were directed to the question of damages only. The principle of the case was, however, relied on in *Henderson v. Canada Atlantic R.W. Co.*, 25 A.R. 437 and 29 S.C.R. 632, and Sir Henry Strong, at p. 636 of the report, says: "Further, I think it right to say that on this evidence (that the bell did not ring, that the speed was over six miles an hour, and that a flagman stationed there did not give warning) we should be justified in holding that there was common law negligence, as in the case of *St. Lawrence and Ottawa R.W. Co. v. Lett*," in 11 S.C.R. 422, and Gwynne, J., in his judgment on the same page, says: "I am of opinion that if the ringing of the bell would prevent an accident to a person crossing the highway there is an obligation at *common law* to ring it."

It was also decided in the *Henderson* case that the statutory warnings apply as well to shunting operations and other temporary movements of traffic, as to a train running on the main line. In a case where shunting was being done in a town, where the jury found that the railway company was guilty of negligence, and that a man should have been stationed on the highway to warn the public, a verdict for the plaintiff was upheld: *Lake Erie and Detroit R.W. Co. v. Barclay*, 30 S.C.R. 360. The same rule has been adopted in the United States: *Pennsylvania R.W. Co. v. Miller*, 99 Federal Reporter 529, but there is judicial authority to the contrary in England: see *Stubley v. London and North Western R.W. Co.*, L.R. 1 Ex. 13, and Mr. Justice Patterson in *Canadian Pacific R.W. Co. v. Fleming*, 22 S.C.R. 44, quotes this case with approval and says: "The Legis-

lature having prescribed the precautions to be taken at level crossings, we have no right to hold those precautions insufficient and to throw it open to the jury on every trial to find *ex post facto* that something more ought to have been done in the case that for the moment excites their sympathy." This remark appears in a dissenting judgment, and differs from the later *Henderson and Barclay Cases*, and the effect of the *Stubley* and similar English cases may perhaps be weakened by *Smith v. South Eastern R.W. Co.* (1896), 1 Q.B. 178. The case of *Girouard v. Canadian Pacific R.W. Co.*, reported 1 Can. Ry. Cas. 343, lays down the rule in Québec that where there is a large amount of traffic at a crossing, additional precautions must be taken to protect the public, and in *Bonneville v. Grand Trunk R.W. Co.*, 1 O.W.R. 304, and *Moyer v. Grand Trunk R.W. Co.*, 3 Can. Ry. Cas. 1, the same principle is again enunciated for Ontario. Where a siding extending across a highway is particularly dangerous, and shunting is being done upon it, a Divisional Court held that, apart from statute, there is a duty cast upon railways to take reasonable precautions at dangerous points, to avoid accident: *Smith v. St. Catharines, etc., R.W. Co.*, 4 O.W.R. 526. Some remarks of the judges of the Supreme Court in *Grand Trunk R.W. Co. v. McKay*, 3 Can. Ry. Cas. 52, when dealing with a later section (sec. 227, *infra*), seem to point, however, to a different conclusion. The subject is dealt with, however, in the notes to that section.

When Signals Required. All persons rightfully upon the railway track, as well as upon the highway crossing next to the coming train, are entitled to the benefit of the provisions of section 256. These statutory warnings are not required where there is a mere way and not a public highway: *Bennett v. Grand Trunk R.W. Co.*, 3 O.R. 446; *Anderson v. Grand Trunk R.W. Co.*, 27 O.R. 414, 24 A.R. 672, 28 S.C.R. 541, and the word "highway" used in this section was defined, in *Royle v. Canadian Northern R.W. Co.*, 3 Can. Ry. Cas. 4, to be a public highway which is so as of right; and there is no statutory duty to give the signals for a mere trail, though if persons using it cross the railway tracks with the consent, express or implied of the railway, it is probably the latter's duty at common law to give such signals as will be necessary for their protection. Neither does the statute apply to a street marked out on a plan and registered, but fenced in with other land and used for past-

ure: *Shoebrink v. Canada Atlantic R.W. Co.*, 16 O.R. 515. Similarly there is no duty to give the statutory signals or to take special precautions in approaching or passing a siding: *Van Wart v. New Brunswick R.W. Co.*, 27 N.B.R. 59, 17 S.C.R. 35, and where the fact that the signals were not given did not contribute to the accident, there can be no recovery, as in the *Shoebrink Case*, where a boy was sitting on a fence adjoining a railway and at a highway, and slipped off and was caught in a passing train, owing to a fright caused by the train giving a sudden jerk when passing him. The right to recover, however, is not limited to cases of actual collision, and where a horse was frightened and ran away, owing to the approach of a train which had not whistled, the occupants of the rig were entitled to recover: *Rosenberger v. Grand Trunk R.W. Co.*, 32 U.C.C.P. 349, 8 A.R. 482, 9 S.C.R. 311; and see *Robertson v. Halifax Coal Co.*, 20 N.S.R. 517, and *Sibbald v. Grand Trunk R.W. Co.*, 19 O.R. 164, 18 A.R. 184, 20 S.C.R. 259; *Victorian Railway Commissioners v. Coultas*, 13 A.C. 222. The mere fact that an automatic bell is on the engine and that it was in good order when leaving the last station is not sufficient to satisfy the statute when there is positive evidence that it was not ringing on approaching the crossing where the accident occurred: *Wilton v. Northern R.W. Co.*, 5 O.R. 490.

Evidence that witnesses did not hear the signals given is not sufficient unless accompanied by a statement that they could have heard them if given: *Ellis v. Great Western R.W. Co.*, L.R. 9 C.P. 551.

An action for damages caused through the failure to give signals is damage done by reason of the railway, and must be brought within one year from its occurrence under section 242, *infra*: *Browne v. Brockville and Ottawa R.W. Co.*, 20 U.C.R. 202.

Contributory Negligence at Highways.

Where there is evidence that the statutory signals were not given, but no evidence of the conduct of deceased just before the accident, the railway company is liable if they fail to prove affirmatively that the deceased was guilty of contributory negligence: *Johnson v. Grand Trunk R.W. Co.*, 25 O.R. 64, 21 A.R. 408, but where contributory negligence is proved the plaintiff cannot recover, even though no signals were given: *Winckler v.*

Great Western R.W. Co., 18 U.C.C.P. 250; *Boggs v. Great Western R.W. Co.*, 23 U.C.C.P. 573, and this last case decides that where plaintiff's son was driving, and the contributory negligence was that of the driver, the plaintiff cannot recover, and it is the duty of a person driving across a railway track to use care and precaution to see whether a train is approaching, and if he does not look when he could have seen along the track for some distance if he did, he cannot succeed: *Johnston v. Northern R.W. Co.*, 34 U.C.R. 432; *Weir v. Canadian Pacific R.W. Co.*, 16 A.R. 100. The *Boggs* case would probably now be decided differently since the decision in *Mills v. Armstrong*, 13 A.C. 1, overruling *Thorogood v. Bryan*, 8 C.B. 115. The Pennsylvania rule of "stop, look and listen" at a highway is not in force in Ontario, and the question of contributory negligence is one depending upon the facts in each case: *Hollinger v. Canadian Pacific R.W. Co.*, 21 O.R. 705, affirmed 20 A.R. 244. In *Blake v. Canadian Pacific R.W. Co.*, 17 O.R. 177, Galt, C.J., held that the plaintiff not having looked for a train while crossing, he could not recover, while Rose, J., differed from him, and MacMahon J., expressed no opinion on this point. *Weir v. Canadian Pacific R.W. Co.*, *supra*, was discussed and explained by Rose, J., in his judgment in this case. Even though cars are in the way and obstruct the view, the person injured may be guilty of contributory negligence: *Filiatrault v. Canadian Pacific R.W. Co.*, 18 Que. R.S.C. 491. As stated by Osler, J.A., in *Vallee v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 338, "where the facts or the proper inferences from the facts are in dispute, . . . the question of contributory negligence is for the jury," see also: *Miller v. Grand Trunk R.W. Co.*, 25 U.C.C.P. 389; *Wilton v. Northern R.W. Co.*, 5 O.R. 490; *Peart v. Grand Trunk R.W. Co.*, 10 A.R. 191; *Beckett v. Grand Trunk R.W. Co.*, 13 A.R. 174, 16 S.C.R. 713.

The general subject of contributory negligence is discussed in the notes preceding section 211.

225. No train or engine shall pass over any crossing where two main lines of railway cross each other at rail-level, until a proper signal has been received by the conductor or engineer in charge of such train or engine from a competent person or watchman in charge of such crossing that the way is clear; provided always, that in the case of an electric street railway

railway crossings. car crossing any railway track not properly protected, it shall be the duty of the conductor, before crossing, to go forward and see that the track to be crossed is clear, before giving the signal to the motorman that the way is clear and to proceed.

Applica-
tion of
section. 2. Every main track of a branch line is a main line within the meaning of this section, which shall apply, whether the said lines be owned by different companies or by the same company. 56 V., c. 27, s. 2, part, Am.

Stoppage
of trains
at rail-
level
crossings. 226. Every train shall, before it passes over any such crossing as in the next preceding section mentioned, be brought to a full stop; but whenever there is in use, at any such crossing, an interlocking switch and signal system, or other device which, in the opinion of the Board, renders it safe to permit engines and trains or electric cars to pass over such crossing without being brought to a stop, the Board may, by order, permit such engines and trains and cars to pass over such crossing without stopping, under such regulations as to speed and other matters as the Board deems proper. 56 V., c. 27, s. 2, part, Am.

Where
safety
devices
are in-
stalled
Board
may
otherwise
order.

The legislation contained in these two sections has come down from 20 Vict., cap. 12, sec. 11, part by which railways crossing one another at rail-level were required to stop for three minutes before making the crossing. The stop was reduced to one minute by later legislation and so appeared in 51 Vict., cap. 29, sec. 258, and 56 Vict., cap. 27, sec. 2, but now, all that is required is that the train shall come to a full stop and shall not proceed except on signal and where interlocking devices have been installed it is not necessary to stop at all, if the signals are not against the train. Section 177, *ante*, requires that no level crossing shall be made without permission of the Board, who may make such provisions for safety as it considers necessary. It is to be observed that not only must interlocking appliances be installed, but permission must also be granted by the Board, before trains may pass over a level crossing without stopping.

Failure to comply with the provisions of these sections confers a civil right of action upon any one injured thereby, and in a case where neither defendant's train or that of the other railway stopped the requisite length of time, and the plaintiff, a traveller on defendant's train, was injured in the collision which followed, he recovered damages from the defendants even though the other company had been still more at fault: *Graham v. Great Western R.W. Co.*, 41 U.C.R. 324. Where a collision occurred at a level crossing and defendant's train had approached at too great a rate of speed to permit it to be stopped by hand brakes (the air brakes having failed to work), this was considered sufficient evidence of negligence to justify a verdict in favour of the plaintiff, and Ritchie, C.J., in his judgment, emphasizes the necessity of approaching such crossings with the greatest care: *Great Western R.W. Co. v. Brown*, 3 S.C.R. 159. By sec. 228 a penalty of one hundred dollars is imposed for a breach of this section.

The rules authorized by the Board on the subject of interlocking devices are printed in the appendix.

227. No train shall pass in or through any thickly peopled portion of any city, town or village, at a speed greater than ten miles an hour, unless the track is fenced or properly protected in the manner prescribed by this Act, or unless permission is given by some regulation or order of the Board. The Board may limit such speed in any case to any rate which it deems expedient. 55-56 V., c. 27, s. 8, Am.

Rate of
speed in
unfenced
portions
of cities,
etc.

This section formerly read: "No locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town or village, at a speed greater than *six* miles an hour, unless the track is fenced in the manner prescribed by this Act."

Formerly, as will be noticed, the track must be fenced "in the manner prescribed by this Act," now, it must be "fenced or properly protected in the manner," etc. The fencing required by the Act is prescribed by section 199 and section 186, enables the Board to make provision for the safety of the public high-way crossings.

Under the previous section there was much discussion as to whether, (1) Railways were required to erect gates or fences

across highways in the thickly peopled parts of cities, towns or villages and (2) Whether a jury might find that, even though statutory requirements had been fulfilled, the dangerous character of the crossing required additional precautions. In *Grand Trunk R.W. Co. v. McKay*, 3 Can. Ry. Cas. 52, it was held, reversing the Court of Appeal for Ontario, that gates need not be erected and that it was for the Railway Committee and not for a jury to prescribe other precautions than those provided expressly by the statute. The subject was elaborately reviewed by the Superior Court of Quebec, in *Tanguay v. Grand Trunk R.W. Co.*, 3 Can. Ry. Cas. 13, although no definite decision on the point was reached and it has also been dealt with, in the notes to these cases in 3 Can. Ry. Cas. 59, where a history of the legislation on this subject appears. The case of *Gerard v. Quebec, etc., R.W. Co.*, Q.R. 25 S.C. 245, appears to be out of harmony with these decisions and an appeal to the Court of King's Bench is pending. In *Tabb v. Grand Trunk R.W. Co.*, 4 Can. Ry. Cas. 1, and *Potvin v. Canadian Pacific R.W. Co.*, *ib.*, 8, where infants had got upon the track owing to a failure to fence, the Courts decided that there had been a clear breach of this provision, and a verdict against the defendants was upheld. Where it is not proved that the accident happened in a "thickly peopled" part of the town, and no order of the Railway Committee is produced requiring the erection of gates, a railway company is not liable for an accident happening when its train is travelling at the normal rate of twelve miles an hour: *Filiatrault v. Canadian Pacific R.W. Co.*, Q.R. 18 S.C. 491.

Too great a rate of speed may be a ground of negligence: *Connell v. The Queen*, 5 Ex. C.R. 74, but it must be borne in mind that railway trains are intended to run fast, and "no rate of speed at which a railway train is run is negligence *per se* in the absence of a statute regulating the rate of speed": *Wasson v. McCook*, 80 Mo. A.R. 483 at p. 489; and the mere fact that a train exceeds the time-table rate of speed is not in itself evidence of negligence: *Colpitts v. The Queen*, 6 Ex. C.R. 254.

Trains,
or cars
moving
reversely
in cities,
etc.

228. Whenever in any city, town or village, any train is passing over or along a highway at rail-level, and is not headed by an engine moving forward in the ordinary manner, the company shall station on the then foremost part of the train, or of the tender, if that is in front, a person who shall warn per-

sons standing on, or crossing, or about to cross, the track of such railway; and for every violation of any of the provisions of this section, or of any of the three sections next preceding, the company shall incur a penalty of one hundred dollars. 55-56 V., c. 27, s. 9.

Though it is not stated that this section is amended, it has been considerably changed, though its effect remains the same. The expression "train" was in the former Act "train of cars" and this was held to include an engine and tender: *Hollinger v. Canadian Pacific R.W. Co.*, 21 O.R. 705, 20 A.R. 244, and now by section 2 (aa), *ante*, a train includes "any engine, or locomotive or other rolling stock." A breach of this section confers a right of action upon any one injured thereby: *Hollinger v. Canadian Pacific R.W. Co.*, *supra*, but a breach of the section does not excuse plaintiff's contributory negligence: *Casey v. Canadian Pacific R.W. Co.*, 15 O.R. 574, and where a train was backing down without a lookout man in a yard, and deceased sprang upon the track to save a woman who did not see it approaching, his representatives could not recover because though his action was praiseworthy, death was due to his own act: *Anderson v. Northern R.W. Co.*, 25 U.C.C.P. 301. This section is not complied with by having a man on the wrong end of the last car where he cannot see persons approaching: *Levoy v. Midland R.W. Co.*, 3 O.R. 623, and additional precautions may be required when cars are being shunted in a dangerous place: *Lett v. St. Lawrence R.W. Co.*, 1 O.R. 545; *Lake Erie, etc., R. W. Co. v. Barclay*, 30 S.C.R. 360. In *Bennett v. Grand Trunk R.W. Co.*, 3 O.R. 446, it was intimated, though not decided, that this provision applied to shunting operations; but now in view of the wording of the present section, it seems to be pretty evident that it does: see *Mott v. Grand Trunk R.W. Co.*, 5 O.W.R. 42.

229. Whenever any railway crosses any highway at rail-Train level, the company shall not, nor shall its officers, agents or ^{must not} employees, wilfully permit any engine, tender or car, or any ^{stand on} portion thereof, to stand on any part of such highway, for a ^{rail-level} longer period than five minutes at one time, or in shunting ^{crossings} to obstruct public traffic for a longer period than five minutes ^{more} at any one time. ^{than five} ^{minutes.}

Penalty. 2. In every case of a violation of this section, every such officer, agent, or employee who has directly under or subject to his control, management or direction, any engine, tender or car which, or any portion of which, is allowed to stand on such highway, longer than the time specified in this section, is liable on summary conviction to a penalty not exceeding fifty dollars, and the company is also liable for each such violation, to a like penalty; provided always that if such alleged violation is in the opinion of the Court excusable, the action for the penalty may be dismissed; and costs shall be in the discretion of the court. 51 V., c. 29, s. 261, Am.

Where violation excusable.

Interpretation.

“Packing.”

230. In this section the expression “packing” means a packing of wood or metal, or some equally substantial and solid material, of not less than two inches in thickness, and which, where by this section any space is required to be filled in, shall extend to within one and a half inches of the crown of the rails in use on any such railway, shall be neatly fitted so as to come against the web of such rails, and shall be well and solidly fastened to the ties on which such rails are laid.

Packing of frogs, etc.

2. The spaces behind and in front of every railway frog or crossing, and between the fixed rails of every switch where such spaces are less than four inches in width, shall be filled with packing up to the under side of the head of the rail.

Packing of wing-rails, etc.

3. The spaces between any wing rail and any railway frog, and between any guard rail and the track rail alongside of it, shall be filled with packing at their splayed ends, so that the whole splay shall be so filled where the width of the space between the rails is less than four inches; such packing not to reach higher than to the under side of the head of the rail: provided, however, that the Board may allow the filling and packing mentioned in this section to be left out, from the month of December to the month of April in each year, both months included, or between any such dates as the Board by regulation, or in any particular case, determines.

Exception in latter cases.

4. The oil cups or other appliances, used for oiling the Oil cups. valves of every locomotive in use upon any railway shall be such that no employee shall be required to go outside the cab of the locomotive, while the same is in motion for the purpose of oiling such valves. 51 V., c. 29, s. 262, Am.

The changes in this section are the use of the words "the filling and packing mentioned in this section" instead of the words "such filling," and the addition of the words "or between any such dates as the Board by regulation or in any particular case determines." These changes were no doubt made in view of the decision of the Privy Council in *Grand Trunk R.W. Co. v. Washington* (1899), A.C. 275, which held that while the Railway Committee had power under the earlier Act, to allow railways to take or leave out the packing, required by sub-section 3, they had no similar power over packing required by sub-section 2. Now, their power extends over the packing prescribed by both sub-sections.

Similar legislation was passed by Ontario before its enactment by the Dominion, but it was held that it could not and did not apply to railways within Federal jurisdiction: *Monkhouse v. Grand Trunk R.W. Co.*, 8 A.R. 637; *Washington v. Grand Trunk R.W. Co.*, 24 A.R. 183, and see *Clegg v. Grand Trunk R.W. Co.*, 10 O.R. 708.

It must be shown that the railway company either knew or had means of knowing that the frog was not packed: *Clegg v. Grand Trunk R.W. Co.*, *ibid.*, but it is the company's duty not only to pack them, but to see that they are kept packed: *Misener v. Michigan Central R.W. Co.*, 24 O.R. 411, and it is not excused on account of the plaintiff's contributory negligence, unless it can show that the servant freely and voluntarily with full knowledge of the nature and extent of the risk he ran, impliedly, agreed to incur it: *LeMay v. Canadian Pacific R.W. Co.*, 18 O.R. 314, 17 A.R. 293. In Manitoba it was held that in the absence of evidence that the system of packing was defective, or that the block employed at the scene of the accident was itself worn away or otherwise improper, it would not be presumed merely from the fact that a person's foot had been caught, that there was negligence on defendant's part. The defendants also having given evidence that they had employed

competent workmen to keep the packing in repair, it was for the plaintiff to prove that they were not competent, and that the deceased's foot had been caught on that account: *Rajotte v. Canadian Pacific R.W. Co.*, 5 Man. L.R. 367.

The corresponding Ontario Act, R.S.O. cap. 266, sec. 5, was applied to a private company operating a short piece of track upon its own premises: *Cooper v. Hamilton Steel & Iron Co.*, 3 O.W.R. 898, 8 O.L.R. 353.

This is one of the breaches of the statute for which a remedy is given by 294, *infra*, and though it also comes within the intent of the Workmen's Compensation Act (Ont.), which limits the damages recoverable under it, yet a person injured by a breach of the section may recover the full damages suffered even though they are greater than those recoverable under the Workmen's Compensation Act: *Curran v. Grand Trunk R.W. Co.*, 25 A.R. 407.

Overdue
trains.

Notice
at
stations.

Time
when
expected
to be
stated.

231. Every company, upon whose railway there is a telegraph line in operation, shall have a blackboard put upon the outside of the station house, over the platform of the station, in some conspicuous place at each station of such company at which there is a telegraph office; and when any passenger train is overdue at any such station, according to the time table of such company, the station agent or person in charge at such station, shall write, or cause to be written, with white chalk on such blackboard a notice in English and French in the province of Quebec, and in English in the other provinces, stating, to the best of his knowledge and belief, the time when such overdue train may be expected to reach such station; and if there is any further change in the expected time of arrival the station agent or person in charge of the station shall write, or cause to be written on the blackboard in like manner, a fresh notice stating, to the best of his knowledge and belief, the time when such overdue train may then be expected to reach such station.

Penalty
for
omission.

2. Every such company, station agent or person in charge at any such station, is, on summary conviction, liable to a penalty not exceeding five dollars for every wilful neglect,

omission or refusal to obey the provisions of this section. 51 V., c. 29, s. 263, Am.

232. His Majesty's mail, His Majesty's naval or military Carriage of mails, forces or militia, and all artillery, ammunition, provisions or troops other stores for their use, and all policemen, constables or with others travelling on His Majesty's service, shall at all times, equip-ment, when required by the Postmaster General of Canada, the Com-etc. mander of the Forces, or any person having the superintendence and command of any police force respectively, and with the whole resources of the company if required, be carried on the railway, on such terms and conditions and under such regulations as the Governor in Council makes. 51 V., c. 29, s. 264.

Similar legislation respecting the use of the railway for military purposes exists in England, under 34 and 35 Vict., cap. 86, and the carriage of the mails is governed by 36 and 37 Vict., cap. 48, secs. 18, 19 and 20, and 56 and 57 Vict., cap. 38.

In *Spence v. Grand Trunk R.W. Co.*, 27 O.R. 303, it was proved that the post-office authorities had provided facilities in a postal car for mailing letters on a train and the plaintiff in order to avail himself of these facilities, went to defendant's station to post a letter and, in doing so, while the train was moving out, fell over an obstruction in the station platform and was hurt. A non-suit having been granted by the trial Judge, his decision was affirmed on appeal as the plaintiff had no invitation from the railway to go upon its premises and was a bare licensee. The arrangements made by the post-office for receiving letters were not looked upon by the Court as equivalent to an invitation by the railway.

Telegraphs and Telephones.

233. The company shall, when required so to do by the Gov- Government ernor in Council, or any person authorized by him, place any may have electric telegraph and telephone lines, and the apparatus and exclusive use of operators it has, at the exclusive use of the Government of Ca- telegraph nada, receiving thereafter reasonable compensation for such wires, etc. service. 51 V., c. 29, s. 265. Compen- sation.

Government may erect wires on right of way.

234. The Governor in Council, may at any time, cause a line or lines of electric telegraph or telephone to be constructed along the line of the railway, for the use of the Government of Canada, and for that purpose may enter upon and occupy so much of the lands of the company as is necessary for the purpose. 51 V., c. 29, s. 266.

Accidents.

Notice of accident.

235. Every company shall, as soon as possible, and immediately after the head officers of the company have received information of the occurrence upon the railway belonging to such company, of any accident attended with serious personal injury to any person using the railway, or whereby any bridge, culvert, viaduct, or tunnel on or of the railway has been broken or so damaged as to be impassable or unfit for immediate use, give notice thereof, with full particulars, to the Board; and every company which wilfully and negligently omits to give such notice shall forfeit to His Majesty the sum of two hundred dollars for every day during which the omission to give the same continues. 51 V., c. 29, s. 267, Am.

Penalty for omission.

This section has been amended by requiring the company to give notice "as soon as possible, and immediately after the head officers of the company have received information," etc., instead of "as soon as possible and within forty-eight hours at the furthest," etc. There are also some verbal changes of slight importance. The "Board" and not the Minister of Railways and Canals, is the body to whom such notices must now be given. Similar legislation in England exists in 34 & 35 Viet., cap. 78, sec. 6, and the order of the Board of Trade regulating the practice in making such returns, will be found in Browne & Theobald, 3rd ed., pp. 658, *et seq.*

By section 305, *post*, semi-annual returns are to be made to the Minister of Railways and Canals of all accidents and casualties to life or property, and by section 308 these, with other returns there mentioned, are to be privileged. The returns required by section 235 are privileged also only when so declared by the Board: section 236. No general regulations on the subject have yet been made.

236. The Board may by regulation declare the manner and form in which such information and notice shall be given and the class of accidents to which the next preceding section shall apply, and may declare any such information so given to be privileged, and the Board may appoint such person or persons as it thinks fit to inquire into all matters and things which it deems likely to cause or prevent accidents, and the causes of, and the circumstances connected with, any accident or casualty to life or property occurring on any railway, and into all particulars relating thereto. 51 V., c. 29, s. 268, Am.

2. The person or persons so appointed shall report fully, in writing, to the Board, his or their doings and opinions on the matters respecting which he or they are appointed to inquire, and the Board may act upon such report and may order the company to suspend or dismiss any employee of the company whom it may deem to have been negligent or wilful in respect of any such accident. 51 V., c. 29, s. 269, Am.

Numerous verbal changes in this section have been made. For English legislation and notes, see notes to section 235.

The power to order the suspension or dismissal of officials found to be at fault is new. For notes on "privilege," see section 308, *infra*.

Animals at Large.

237. No horses, sheep, swine, or other cattle, shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any railway at rail-level, unless such cattle are in charge of some competent person or persons, to prevent their loitering or stopping on such highway at such intersection, or straying upon the railway.

2. All cattle found at large contrary to the provisions of this section may, by any person who finds the same at large, be impounded in the pound nearest to the place where the same are so found, and the pound-keeper with whom the same are

impounded shall detain the same in the like manner, and subject to like regulations as to the care and disposal thereof, as in the case of cattle impounded for trespass on private property.

Right of
action
negated

3. If the cattle of any person, which are at large contrary to the provisions of this section, are killed or injured by any train, at such point of intersection, he shall not have any right of action against any company in respect of the same being so killed or injured. 51 V., c. 29, s. 271, Am.

Negli-
gence of
owner
not
presumed

4. When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall be entitled to recover the amount of such loss or injury against the company in any action in any court of competent jurisdiction, unless the company, in the opinion of the court or jury trying the case, establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent; but the fact that such animal was not in charge of some competent person or persons shall not for the purposes of this sub-section, deprive the owner of his right to recover. Sub. for 53 V., c. 28, s. 2.

Effect of Act of 1888. Before considering the changes made in the law by sub-section 4 of this section, it will be necessary to explain the rules in force before its enactment.

The duty of the railway company to provide cattle guards at highways is provided for by the same section, and in the same terms as the duty to maintain fences, the clause now being section 199, *ante*. Prior to the passing of the Railway Accidents Act, 1857, 20 Vict., cap. 12, sec. 16, this section had the effect of rendering a railway company liable where cattle got on the track through defective cattle guards, even though they were straying on the highway at the time: *Huist v. Buffalo and Lake Huron R.W. Co.*, 16 U.C.R. 299; and this rule was sometimes adopted in Quebec, even after the passing of the statute in question: *Pontiac Pacific Junction R.W. Co. v. Brady*, Mont. L.R. 4

Q.B. 346; *Cross v. Canadian Pacific R.W. Co.*, Que. R. 2 S.C. 365; but the law in Quebec appears to be now settled in conformity with the present law in Ontario as we are about to deal with it: *Cross v. Canadian Pacific R.W. Co.*, Que. R. 3 Q.B. 170; *Campbell v. Grand Trunk R.W. Co.*, Q.R. 3 Q.B. 570; Abbott on Railways, p. 406. The section of the Railway Accidents Act, already quoted, made a very marked change in the law. It was passed in the interests of the travelling public to lessen the danger from derailment of trains, through stray cattle lying down on the track: *Thompson v. Grand Trunk R.W. Co.*, 18 U.C.R. 92; *McGee v. Great Western R.W. Co.*, 23 U.C.R., at p. 297; *Markham v. Great Western R.W. Co.*, 25 U.C.R., at p. 576; and has been adopted without change in all subsequent consolidations of the Railway Act, and appears in the Act of 1888 as section 271. Being in the public interest, it has received a wide construction, and it has been held that where cattle are at large upon the highway, the owner cannot recover for their loss whether they are killed on the highway at the point of intersection with the railway: *Ferris v. Grand Trunk R.W. Co.*, 16 U.C.R. 474; or on the railway lands to which they have wandered owing to the absence or defective condition of cattle guards: *Simpson v. Grand Trunk R.W. Co.*, 17 U.C.R. 57; *Thompson v. Grand Trunk R.W. Co.*, 18 U.C.R. 92; *Cooley v. Grand Trunk R.W. Co.*, *ibid.*, 96; *Markham v. Great Western R.W. Co.*, 25 U.C.R. 572; *Thompson v. Grand Trunk R.W. Co.*, 22 A.R. 453; *Nixon v. Grand Trunk R.W. Co.*, 23 O.R. 124; *Whitman v. Windsor and Annapolis R.W. Co.*, 18 N.S.R. 271; *Phillips v. Canadian Pacific R.W. Co.*, 1 Man. L.R. 110; and the mere fact that the railway company omits to give the usual highway signals prescribed by section 224 of this Act, or is negligent in the management of its trains, will not give the owner the right to recover unless such negligence amounted to recklessness and wilful misconduct on the part of its servants. See the cases last cited, and particularly *McGee v. Great Western R.W. Co.*, *supra*.

The question whether animals using the highway within half a mile of the railway track are sufficiently "in charge" within the meaning of the Railway Act must depend upon the circumstances of each case; but it is apparent from the cases already cited, particularly the two *Thompson Cases*, that the control which the owner is required to exercise over them must be sufficient, under ordinary circumstances at least, to enable him to keep

them off the railway track if necessity requires; and the mere presence of attendants, who are not numerous or experienced enough to do so, though they make the attempt, does not satisfy the terms of the statute; but where there is sufficient control for ordinary purposes, there may be cases in which the fright caused by something unusual or improper in the management of the train will render them so unruly that no ordinary power can control them: see *Styles v. Michigan Central R.W. Co.*, 18 Canadian Law Times 5; *Duffield v. Grand Trunk R.W. Co.*, 31 Canada L.J. 667, and the dictum of Gwynne, J., in *Grand Trunk R.W. Co. v. James*, 1 Can. Ry. Cas., at p. 427; but "where the evidence for the plaintiff clearly and decisively shows that a horse, for the killing of which by their locomotive an action is brought against a railway company, was not in charge, the judge presiding at the trial ought, as a matter of law, to rule that the company have incurred no liability whatever:" *per* Draper, C.J.; *Markham v. Great Western R.W. Co.*, 25 U.C.R. 572, at p. 576, quoted by Osler, J.A., in *Thompson v. Grand Trunk R.W. Co.*, 22 A.R., at p. 459. Where an animal is properly "in charge" within the meaning of the Act, and the company omits to give the usual signals for highway crossings, the owner would be entitled to recover: *Tyson v. Grand Trunk R.W. Co.*, 20 U.C.R. 256.

This section and section 194 of the Act of 1888, were much discussed in *James v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 407 and 409, and *Grand Trunk R.W. Co.*, *ibid.*, 422; where the principles laid down in the earlier cases here mentioned were considered and re-affirmed, and it was held that a railway company is under no obligation to erect or maintain a fence on each side of a culvert across a watercourse and where cattle went through the culvert into a field and from thence to the highway and straying on to the railway track were killed, the company was not liable to their owner. Where, however, the failure of a railway company to maintain its fences was the cause of cattle getting out and straying on the highway and thence on to the track, where they were killed, the company was held liable, and this section afforded no defence, as the breach of it was the fault of defendants and not of the plaintiff: *Davidson v. Grand Trunk R.W. Co.*, 2 Can. Ry. Cas. 371; see *Fensom v. Canadian Pacific R.W. Co.*, *ib.*, 376, 3 Can. Ry. Cas. 231, 4 Can. Ry. Cas. 76.

It is to be observed that the section deals with cattle at large "upon the highway" but, apart from this addition, cattle could not be considered at large merely because they had escaped from the owner's close into another close or field. They are only "at large" when straying upon the highway, or on public property or commons: *McSloy v. Smith*, 26 O.R. 508.

Effect of Act of 1903. The changes, other than those made by sub-section 4, are not numerous or important. The word "competent" has been added in line 4 of sub-section 1, before "person" and the words "or straying upon the railway" at the end of the sub-section. Even without the use of "competent," it may be supposed that they would not be in charge unless the person caring for them were competent: *Thompson v. Grand Trunk R.W. Co.*, 18 U.C.R. 92; *Thompson v. Grand Trunk R.W. Co.*, 22 A.R. 453; while the addition of the words "or straying upon the railway" sets at rest a point once mooted in *Simpson v. Grand Trunk R.W. Co.*, 17 U.C.R. 57, and kindred early cases, namely, whether the section applied only to cattle killed at the intersection or also to cattle which got from the intersection on to railway lands. The decisions mentioned, however, considered that the section would include either case.

Sub-section 4, is more radical in its effect and offers greater difficulties. Its progenitor, 53 Vict., cap. 28, sec. 2, was an amendment to section 194 of the Act of 1888, and altered the railway company's liability where cattle escaped owing to defective fences; but it had not primarily anything to do with the case of cattle at large upon a highway, though its form offered a number of problems for solution which were discussed in the *James, Davidson and Fensom Cases* quoted above.

The first difficulty in construing the new section arises out of the words "or otherwise" in line two. Possibly it refers to cattle at large upon the highway, or otherwise upon the highway; that is in charge upon it. The words "get upon the property of the company" seem to exclude the case of cattle killed at the intersection of the railway with the highway, and to have the same effect as the words "straying on the railway" added at the end of clause one, and if this interpretation is correct, clause four would only apply to cases where cattle have got from the highway upon railway lands and the old law would govern. If the original intention of the statute, namely, the

protection of persons on trains from accidents due to colliding with cattle, is borne in mind, such a limited construction of the present clause might not be quite proper.

The words "by a train" no doubt, render the clause inapplicable to a case where cattle are injured by other means on the railway lands; see notes to section 199, *ante*, and *McKellar v. Canadian Pacific R.W. Co.*, 3 Can. Ry. Cas. 322.

Where, however, the clause does apply, it now lies on the railway to show, not merely that the cattle killed were at large upon the highway, but also, in the words of the sub-section, that "the animal got at large through the negligence or wilful act or omission of the owner or his agent or of the custodian of such animal or his agent." This evidence is required not for the purposes of the whole of section 237; but only "for the purposes of this sub-section." Where, therefore, cattle are killed while at large, and it can be shown that sub-section 4 does not apply, the onus of proof and character of evidence required appears to remain unchanged.

Weeds on Company's Land.

Company
to remove
weeds.

238. Every company shall cause thistles and all noxious weeds growing on the right of way and over land of the company adjoining the railway to be cut down or to be rooted out and destroyed each year before the plants have sufficiently matured to seed.

Penalty.

2. Every company which fails to comply with this section shall incur a penalty of two dollars for every day during which such company neglects to do anything which it is so required to do; and the mayor, reeve or chief officer of the municipality of the township, county or district in which the land or ground lies, or any justice of the peace therein, may cause all things to be done which the said company is so required to do, and for that purpose may enter, by himself and his assistants or workmen, upon such lands, and may recover the expenses and charges incurred in so doing, and the said penalty, with costs, in any court of competent jurisdiction, and such penalty shall be paid to the proper officer of the municipality. 51 V., c. 29, s. 275, Am.

On de-
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Costs.

This section has been changed principally by substituting, "each year before the plants have sufficiently matured to seed" for the expression "early in July in each year."

Its evident intention is to prevent damage to adjoining lands by allowing the seeds of noxious weeds to grow and spread; but at common law the company is bound to keep its line clear of dried or inflammable weeds or rubbish likely to catch fire and spread from its own lands to other property, and failure to do so may constitute negligence for which the company will be liable: *Rainville v. Grand Trunk R.W. Co.*, 1 Can Ry. Cas. 113, 117; *Grand Trunk R.W. Co. v. Rainville*, *ib.*, 125; and companies are now required by statute (section 239), to keep their right of way free from combustible material. It is not *per se*, negligence for a railway company to allow grass and weeds to grow on a side track, so as to present the possibility of an employee catching in it and being hurt by a train: *Wood v. Canadian Pacific R.W. Co.*, 6 B.C.R. 561, 30 S.C.R. 110.

Prevention of, and Liability for, Fires.

239. The company shall at all times maintain and keep its right of way free from dead or dry grass, weeds and other unnecessary combustible matter. Prevention.

2. Whenever damage is caused to crops, lands, fences, plantations, or buildings and their contents, by a fire, started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage and may be sued for the recovery of the amount of such damage in any court of competent jurisdiction; Liability for fire caused by locomotive.

Provided that if it be shown that the company has used modern and efficient appliances and has not otherwise been guilty of any negligence, the total amount of compensation recoverable under sub-section two of this section, in respect of any one or more claim for damage from a fire or fires started by the same locomotive and upon the same occasion, shall not exceed five thousand dollars, and it shall be apportioned amongst the parties who suffered the loss as the court or judge may determine. Proviso.

Company has insurable interest. 3. The company shall have an insurable interest in all such property upon or along its route, for which it may be so held liable, and may procure insurances thereon in its own behalf.

Owing to the drastic legislation contained in this section, much of the older learning upon the subject will not ordinarily apply, but as there are a number of cases in which it will still be important, it may well be summarized here before pointing out the changes made in this Act.

In Quebec, prior to the reversal of the Quebec Courts by the Privy Council in *Canadian Pacific R.W. Co. v. Roy*, 1 Can. Ry. Cas. 196, the law made a railway company liable for damages done by fire at all events, and it was not necessary to prove that the company had been guilty of negligence, but the Privy Council, by reversing the judgments of the Quebec Courts, have denied the correctness of this doctrine and placed the law as to railways operating under the Dominion Railway Act, at least, upon the same footing for all provinces.

The former rules governing this subject may probably be summarized as follows:—

1. At common law a railway company being entitled to operate its trains and engines by the charter of a duly constituted authority is not liable for such fires as are ordinarily incident to the careful operation of its railway and is not liable in damages for resulting injury to property owners. This was decided as early as 1841 in *Aldridge v. Great Western R.W. Co.*, 3 Mann. & G. 515, where Tindal, C.J., says at page 523: "To entitle the plaintiff to recover he must either show some carelessness by the defendants or lay facts before the jury from which it can be inferred," and the same principle runs through nearly all later English and Canadian decisions (except Quebec): see in addition to *Oatman v. Michigan Central R.W. Co.*, 1 Can. Ry. Cas. 129; *Vaughan v. Taff Vale R.W. Co.*, 5 H. & N. 679; *Canada Central R.W. Co. v. MacLaren*, 8 A.R. 564; *Phillips v. Canadian Pacific R.W. Co.*, 1 Man. L.R. 110; *Robinson v. New Brunswick R.W. Co.*, 23 N.B.R. 323; *New Brunswick R.W. Co. v. Robinson*, 11 S.C.R. 688; *Canadian Pacific R.W. Co. v. Roy*, 1 Can. Ry. Cas. 196.

This doctrine was once dissented from in *Powell v. Fall*, 5 Q.B.D. 597, where it was held that the defendant was liable to

compensate the plaintiffs for injury done to a haystack by defendant's traction engine, though it was constructed in conformity with the English Locomotive Acts, upon the ground that the engine, being a dangerous machine, an action was maintainable at common law, and the case of *Vaughan v. Taff Vale R.W. Co.*, 5 H. & N. 679, was said to be wrongly decided; but this case has never been applied since to a fire caused by a railway engine, and in view of the later English and Canadian decisions it may be said that it is not law in Canada. The case is explained by Burton J.A., in *Canada Central R.W. Co. v. MacLaren*, 8 A.R. at p. 583. Unless a railway company has been expressly authorized to use steam engines, it is liable for damages done by fire, though no negligence is proved: *Jones v. Festiniog R.W. Co.*, L.R. 3 Q.B. 733; *Hilliard v. Thurston*, 9 A.R. 514. The subject was discussed in *Welleans v. Canada Southern R.W. Co.*, 21 A.R. 297, and *Michigan Central R.W. Co. v. Welleans*, 24 S.C.R. 309, where it was conceded that had the Michigan Central Railway Company not had authority to operate over the line of the Canada Southern Railway Company, it would have been liable for damages caused by fire without proof of negligence.

2. The onus of proving negligence causing the damage is on the plaintiff: *Vaughan v. Taff Vale R.W. Co.*, *supra*; *Smith v. London and South Western R.W. Co.*, L.R. 5 C.P. 98, at pp. 105 and 106, and 6 C.P. 14; *Sénézac v. The Central Vermont R.W. Co.*, Q.R. 9 S.C. 319, 26 S.C.R. 641; *Port Glasgow and Newark Sailcloth Co. v. Caledonian R.W. Co.*, 19 Rettie 608, 20 Rettie 35. See particularly the remarks of Lord Herschell quoted in *Oatman v. Michigan Central R.W. Co.*, 1 Can Ry. Cas. 129, by Osler, J.A., *ante*, p. 137.

3. Proof of the emission of sparks from an engine, and that fire was set thereby, is not of itself evidence of negligence sufficient to render the railway company liable. Whatever may have been the law in Quebec as appearing in the judgments of *Roy v. Canadian Pacific R.W. Co.*, 1 Can Ry. Cas. 170, and in the argument of Geoffrion, Q.C., in *Sénézac v. Central Vermont R.W. Co.*, 26 S.C.R., at pp. 642 & 643, it has long been held in England and the other provinces of Canada that "the railway company having the statutory power of running along the line with locomotive engines, which in the course of their running are apt to discharge sparks, no liability rests upon the company, merely

because the sparks emitted by an engine have set fire to the adjoining property:" *per* Lord Herschell, *Port Glasgow and Newark Sailcloth Co. v. Caledonian R.W. Co.*, 20 Rettie 35, quoted by Osler J.A., in *Oatman v. Michigan Central R.W. Co.*, *supra*. This is but an example of the general rule stated by Lord Blackburn in a leading case as follows: "For I take it without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorized if it be done negligently:" *Geddis v. Proprietors of Bann Reservoir*, 3 A.C. 430, at pp. 455 and 456; see also *Hewitt v. Ontario, Huron and Simcoe R.W. Co.*, 11 U.C.R. 604; *Ball v. Grand Trunk R.W. Co.*, 16 U.C.C.P. 252; *Jaffrey v. Toronto, Grey and Bruce R.W. Co.*, 23 U.C.C.P. 553, 24 U.C.C.P. 271; *Fournier v. Canadian Pacific R.W. Co.*, 33 N.B.R. 565; *Jackson v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 156.

4. If negligence on the part of the railway company is proved, the mere fact that the property injured is close to the railway lands, or that the owner allowed inflammable material to lie close to the track is not evidence of contributory negligence.

This rule has been the subject of debate. In *New Brunswick R.W. Co. v. Robinson*, 11 S.C.R. 688, Sir J. W. Ritchie states at page 690: "There was, in my opinion, evidence most proper for the consideration of the jury as to whether the plaintiff was not guilty of great negligence in placing such a combustible article as hay so near the railway, with such openings as exposed such combustible material to fire from sparks from passing locomotives." This was a *dictum*, and Strong, J., in the same case at p. 696, dissents from this view in the following language: "I am not able to concur in the view that contributory negligence on the part of the plaintiff was shown by the fact that he maintained his barns in a dangerous proximity to the railway. I apprehend that a landowner has the right to make any use of his land he pleases, and is entitled to be protected in that use from the culpable negligence of others." In 1874 the law on this point was stated by Hagarty, C.J.C.P., in these words: "As to contributory negligence we do not think we can hold that the plaintiff is bound to keep or manage his land in any particular manner because a railway runs close to or along it, or that, as a

matter of law he is bound to keep his land cleaner or to remove brushwood, etc., with more expedition, etc., in anticipation of the possible occurrence of fire on the railway track." He says lower down: "The jury may properly be told that every man should keep his property and premises in a reasonably careful way." *Jaffrey v. Toronto, Grey and Bruce R.W. Co.*, 23 U.C.C.P. 553, at p. 560; see 24 U.C.C.P. 271. In *Holmes v. Midland R.W. Co.*, 35 U.C.R. 253, it was held that the plaintiff was not guilty of contributory negligence in having left the trees felled by him on his own land, and in *MacLaren v. Canada Central R.W. Co.*, 32 U.C.C.P. 324, it was decided that the plaintiff was not bound to provide appliances to guard against defendant's negligence. This decision was affirmed on other grounds by a divided Court, *sub nom. Canada Central R.W. Co. v. MacLaren*, 8 A.R. 564. This case was affirmed by the Privy Council, see R. & J. Digest, (1882-1884). *Sub voce. Canada Central R.W. Co. v. MacLaren*, and 21 Canada Law Journal, 114. A majority of the Court in New Brunswick also arrived at a similar decision in *Campbell v. McGregor*, 29 N.B.R. 644, Allen, C.J., and Wetmore, J., dissenting. But a railway company, if not negligent, is not bound to take extraordinary precautions at a point where a landowner has left his property exposed to risk from fire: *Hill v. The Ontario, Huron and Simcoe R.W. Co.*, 13 U.C.R. 503. In the United States, where by statute a railway company is made liable for damages by fire, at all events without regard to negligence the defence of contributory negligence is excluded where no fraud or intentional exposure of property is shewn: *Pierce on Railways*, 446; *Grand Trunk R.W. Co. v. Richardson*, 91 U.S. 454, but the plaintiff cannot recover when, having knowledge of the fire, he failed to use reasonable efforts to save his property from it, *Pierce on Railways*, p. 435. Speaking generally the rule as to contributory negligence may probably be accurately stated as above, although as will be seen from this review there is a substantial minority of judicial opinion in favour of the opposite view.

5. Negligence may consist in:—

- (a) The use of defective engines or appliances.
- (b) The improper and negligent management of the engine or train.
- (c) Failure to remove combustible material from railway lands.

(a) *The Use of Defective Engines or Appliances.*

A portion of the remarks of Lord Herschell in *Port Glasgow and Newark Sailcloth Co. v. Caledonia R.W. Co.*, 20 Rettie, 35, already quoted, will best define the law on this point. "They (the railway company) are aware that locomotive engines are apt to emit sparks. Knowing this, they are bound to use the best practicable means according to the then state of knowledge to avoid the emission of sparks, which may be dangerous to adjoining property; and if they, knowing that the engines are liable thus to discharge sparks, do not adopt reasonable precautions, they are guilty of negligence." The following cases may also be consulted on this point: *Piggot v. The Eastern Counties R.W. Co.*, 3 C.B. 229; *Hewitt v. Ontario, Simcoe and Huron R.W. Co.*, 11 U.C.R. 604; *Campbell v. McGregor*, 29 N.B.R. 644; *Fremantle v. London and North Western R.W. Co.*, 10 C.B.N.S. 89, where it was held that the absence of a spark arrester constituted negligence: *Canada Central R.W. Co. v. MacLaren*, 8 A.R. 564, where the negligence consisted in a defective smoke stack: *Moxley v. Canada Atlantic R.W. Co.*, 14 A.R. 309; *Canada Atlantic R.W. Co. v. Moxley*, 15 S.C.R. 145; *Canada Southern R.W. Co. v. Phelps*, 14 S.C.R. 132; the fact that an engine is a wood burner is not of itself evidence of negligence: *Robinson v. New Brunswick R.W. Co.*, 23 N.B.R. 323; *New Brunswick R.W. Co. v. Robinson*, 11 S.C.R. 688, though that fact was admitted as an element for the consideration of the jury in *Moxley v. Canada Atlantic R.W. Co.*, *supra*; nor is a diamond stack, instead of a straight stack of itself proof of negligence: *Oatman v. Michigan Central R.W. Co.*, 1 Can Ry. Cas. 129.

(b) *The Improper and Negligent Management of the Train or Engine.*

An engine is not bound to shut off steam or to take extraordinary precautions in passing inflammable property on the owner's land: *Hill v. The Ontario, Simcoe and Huron R.W. Co.*, 13 U.C.R. 503, but neglect to empty the ashpan of an engine may be evidence of negligence: *McGibbon v. Northern R.W. Co.*, 11 O.R. 307, 14 A.R. 91, or the negligent management of the engine by trying to get up speed too quickly: *Canada*

Southern R.W. Co. v. Phelps, 14 S.C.R. 132, or to run a train too heavily laden on an up grade when there was a strong wind, thereby causing the escape of an unusual quantity of sparks: *North Shore R.W. Co. v. McWillie* (1890), 17 S.C.R. 511; but the mere fact that there was a heavy up grade near where the fire was set is not evidence of negligence: *Fournier v. New Brunswick R.W. Co.*, 33 N.B.R. 563.

(c) *Failure to Remove Combustible Material from Railway Lands.*

The case of *Rainville v. Grand Trunk R.W. Co.*, 28 O.R. 625, 25 A.R. 242, and 29 S.C.R. 201, sufficiently explains this point and collects all the authorities. It has been said (*obiter*), that the mere existence of a brush fence maintained by the railway company and not objected to by the owner, is not evidence of negligence under this head: *Holmes v. The Midland R.W. Co.*, 35 U.C.R. 253. The existence of any trimmings: *Smith v. London and South Western R.W. Co.*, L.R. 5 C.P. 98, L.R. 6 C.P. 14; cut and dried weeds and grass: *Rainville v. Grand Trunk R.W. Co.*; a station with a platform having oil spilt on it in dry weather: *Canada Southern R.W. Co. v. Phelps*, *supra*; *Jaffrey v. Toronto, Grey and Bruce R.W. Co.*, 23 U.C.C.P. 553; may be evidence of negligence, but, as this last case holds, regard must be had to the state of the country through which the railway passes.

6. The statute 14 Geo. 3 Cap. 78, sec. 86, Imp., relieving persons from liability for fires accidentally started by them, though in force in Ontario, does not prevent the recovery from a railway company of damages for fire negligently begun. Though neither the statute of Geo. III. nor the parent Act, 6 Anne ch. 3, subsections 6 and 7, of which it is an extension, appear in any of the schedules of vol. 3 of the Revised Statutes of Ontario, 1897, it appears from the decision in *Canada Southern R.W. Co. v. Phelps*, 14 S.C.R. 132, that it is in force in Ontario, but after some discussion *pro* and *con*, in *MacCallum v. The Grand Trunk R.W. Co.*, 30 U.C.R. 122, 31 U.C.R. 527, and *Jaffrey v. Toronto, Grey and Bruce R.W. Co.*, 23 U.C.C.P. 553, it was decided in *Holmes v. Midland R.W. Co.*, 35 U.C.R. 253, and *Canada Southern R.W. Co. v. Phelps*, 14 S.C.R. 132, that where negligence on the part of the railway was proved, there was no accidental fire.

and, consequently that the statute did not relieve the company from liability.

7. If a fire is the result of a railway company's negligence, in the absence of any special limitation or exemption, it is liable for all property burnt, and not only for that which is first set alight, even though the fire spreads to the property of the third person. The great hardships upon railway companies of such unlimited liability led to an attempt to introduce a more restricted rule, and Henry, J., in a dissenting judgment after an elaborate review of the authorities in England and America, in *Canada Southern R.W. Co. v. Phelps*, 14 S.C.R. 132, contended for a less sweeping construction of the law, but the majority of the Court took a different view and held that the railway company was liable for all property to which a fire caused by it spread and which it destroyed, and this decision was followed in *Central Vermont R.W. Co. v. Stanstead, etc., Insurance Co.*, Q.R. 5 Q.B. 224: see particularly the remarks of Hall, J., at p. 250; but as already stated, a plaintiff could not recover where, having knowledge of the fire, he failed to use reasonable efforts to protect his property from it; *Pierce*, p. 435.

8. Where a fire results in the destruction of land or fixtures upon it, the action though for a tort, can only be brought in the province in which the cause of action arose, but where moveables are destroyed the action can be brought in any province.

In *Campbell v. McGregor*, 29 N.B.R. 644, it was decided that an action could be brought in New Brunswick for an injury to land by fire committed in the Province of Quebec. This was stated by King J., in that case at pp. 653 and 654: but while such is the general rule which governs torts other than injury to land, it was decided by the House of Lords in *Companhia de Mocambique v. British South Africa Co.* (1892), 2 Q.B. 358, (1893), A.C. 602, that this rule did not apply to injuries to real estate, and consequently in *Brereton v. Canadian Pacific R.W. Co.*, 29 O.R. 57, the rule above suggested was laid down by Boyd, C., and *Campbell v. McGregor* was not followed in view of the later decisions, although the plaintiff was permitted to continue his action in Ontario for furniture destroyed in Manitoba, provided he abandoned his claim for loss of his house. The distinction between damages to land and other torts committed out of the province was clearly drawn in *Tytler v. Canadian Pacific R.W. Co.*, 29 O.R. 654, 26 A.R. 67.

9. The fact that the danger from fire was considered and allowed for when the railway lands were taken from the adjoining owner, does not deprive him of his right to recover for actual damages for loss from a fire subsequently occurring.

The contrary contention has been but rarely raised in Canada, but the rule as here stated appears to have been almost universally adopted in the United States: *Pierce on Railways*, pp. 432 and 433; *Pierce v. Worcester, etc., R.W. Co.*, 105 Mass. 199; and this rule was approved by Hall, J., in *Central Vermont R.W. Co. v. Stanstead, etc., Insurance Co.*, Q.R. 5 Q.B. 224.

10. The question of the origin of fire or of negligence on the part of the railway company must not be the result of mere conjecture or opinion, but inferences may be drawn from surroundings, circumstances or previous conduct, which will establish liability.

This rule is necessarily indefinite and is stated with hesitation, as there has been much discussion as to what should be admitted as evidence of the cause of fire or of negligence. Mere conjecture as to the cause of the fire would not be evidence proper for submission to a jury: *Canada Paint Co. v. Trainor*, 28 S.C.R. 352; *The Dominion Cartridge Co. v. Cairns, ib.* 361; *Kervin v. Canada Coloured Cotton Co.*, 29 S.C.R. 478, reversing *Kervin v. Canada Coloured Cotton Co.*, 28 O.R. 73, 25 A.R. 36 and opinionative testimony as to what might have occurred under given circumstances is not admissible as evidence: *Peacock v. Cooper*, 27 A.R. 128. The chief difficulty has centered round the question whether evidence may be given of other fires that have been set on the same line of railway. It has been decided by the Privy Council in *Canada Central R.W. Co. v. MacLaren*, 21 Canada Law Journal, 111, that evidence is admissible to show that a particular engine habitually threw more fire than the other locomotives used on the same railway, and this may perhaps be accepted as the true effect of this decision, notwithstanding the somewhat general remarks dropped by some of the learned judges who heard the case in the Divisional Court and Court of Appeal, 32 U.C.C.P. 324, and 8 A.R. 564. Where counsel for the railway company himself elicited the fact that other fires had taken place, it was held that no objection could afterwards be taken: *Campbell v. McGregor*, 29 N.B.R. 644. In *Pigot v. Eastern Counties R.W. Co.*, 3 C.B. 229, it was held that

evidence was admissible to show that other engines belonging to the same company on other occasions in passing along the line, threw sparks to a sufficient distance to reach the building subsequently burned, but the decision cannot be quoted as authority for the statement that proof of other fires started by other engines is evidence of negligence: *Osler J.A.*, in *Oatman v. Michigan Central R.W. Co.*, 1 Can Ry. Cas. 129, at p. 139, quoting *Groom v. Great Western R.W. Co.*, 8 Times L.R. 253, and *Earl of Shaftesbury v. Great Western R.W. Co.*, 11 Times L.R. 126 and 269 seems to decide that evidence may be given to show the greater frequency of fires from engines having a diamond stack compared with those equipped with a straight stack. These cases all dealt with the admissibility of such evidence; they do not, of course, decide as to its weight with a jury if allowed in evidence. But evidence that an entirely different engine threw an unusual quantity of sparks cannot be admitted: *Hewitt v. Ontario, Simcoe and Huron R.W. Co.*, 11 U.C.R. 604, and in the United States it has been held that evidence of other fires is not admissible to prove negligence: *Lake Erie, etc., R.W. Co. v. Miller*, 57 North Eastern Reporter 596, but the contrary has also been decided, see *Pierce on Railroads*, pp. 438 and 439. It is submitted that evidence of other fires should be carefully scrutinized before being admitted, as the existence of a grade or a curve, differences in the velocity of the wind, the combustible nature of material at other places, differences in speed or in the weight of the train load, differences in the quality of the fuel used, the management of different engineers or firemen, all are elements in considering the cause of fires, and these elements must vary greatly on each occasion, so that the probability of the same cause or combination of causes contributing to the occurrence of two or more fires is often extremely remote. Evidence that changes were made in an engine after a fire occurred would probably not be admissible: *Pudsey v. Dominion Atlantic R.W. Co.*, 27 N.S.R. 498; *Cole v. Canadian Pacific R.W. Co.*, 19 P.R. 104, though evidence of the necessity for repairs has been admitted, the Court of Appeal being divided on the subject, as also on the question whether other fires previously thrown by the same engine should be admitted: *Canada Central R.W. Co. v. MacLaren*, 8 A.R. 564.

Effect of Act of 1903. The statutory changes now made in the liability of the railway companies are:—

1. Unnecessary combustible material must be removed from the right of way.

2. Damage to property to the extent of \$5,000 must be paid by the company, whether negligent according to pre-existing rules of law or not.

3. Where the damage is over \$5,000, the company is only liable for negligence, but the onus of proving the use of "modern and efficient appliances" is shifted from the plaintiff to the company, who must also prove the absence of negligence.

4. The company is given an insurable interest in property along its line of route for which it may be liable under this section.

The property for which the company is liable is limited in a curious way to "crops, lands, fences, plantations or buildings and their contents," so that if property not enumerated in this section, is burnt, the company is only liable at common law for its destruction, unless it is in a building; for instance, goods burnt while in a field are not included, and it may become a subject for discussion whether, *e.g.*, hay stacks in the open air are included. The use of "plantations" is unusual in our legislation, but may be useful in order to recover property not included in the terms "crops" "lands" or "buildings." Some question may also arise, whether standing timber affixed to the freehold is included. It is not mentioned in the definition of "lands" in section 2 (*m*), *ante*.

Purchase of Railway by Person without Corporate Power to Operate.

240. If any railway, or any section of any railway, is sold under the provisions of any deed or mortgage, or at the instance of the holders of any mortgage, bonds, or debentures, for the payment of which any charge has been created thereon, or under any other lawful proceeding, and is purchased by any person not having corporate power to hold and operate the same, the purchaser shall not run or operate such railway until authority therefor has been obtained under the following provisions:—

Non-corporate purchaser to obtain authority to operate.

Proceed-
ings.

2. The purchaser shall transmit to the Minister, an application in writing stating the fact of such purchase, describing the termini and lines of route of the railway purchased, specifying the Special Act under which the same was constructed and operated, and requesting authority from the Minister to run and operate the railway, and with such application shall transmit a copy of any writing preliminary to the conveyance of such railway, made as evidence of such sale, and also a duplicate or authenticated copy of the deed of conveyance of such railway, and such further details and information as the Minister may require.

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for
certain
period.

3. Upon any such application, the Minister may, if he is satisfied therewith, grant an order authorizing the purchaser to run and operate the railway purchased until the end of the then next session of the Parliament of Canada, subject to such terms and conditions as the Minister may deem expedient, and thereupon the purchaser shall be authorized, for such period only and subject to such order of the Minister, to operate and run such railway, and take and receive such tolls in respect of traffic carried thereon, as the company previously owning and operating the same was authorized to take, and shall be subject, in so far as the same can be made applicable, to the terms and conditions of the Special Act of the said company.

Terms
and con-
ditions.

Applica-
cation for
corporate
powers.

4. Such purchaser shall apply to the Parliament of Canada at the next following session thereof after the purchase of such railway, for an Act of incorporation or other legislative authority, to hold, operate and run such railway; and if such application is made to Parliament and is unsuccessful, the Minister may extend the order to run and operate such railway until the end of the then next following session of Parliament, and no longer; and if during such extended period the purchaser does not obtain such Act of incorporation or other legislative authority, such railway shall be closed or otherwise dealt with by the Minister, as may be determined by the Governor in Council. 51 V., c. 29, s. 280, Am.

One
extension
allowed.

Closing
of road.

By this section the former enactments, sections 278, 279 and 280, have been amended and consolidated. The chief changes are:—

1. The omission of the words “or corporation” after “persons” in sub-section 1, line 6. As, however, by R.S.C. cap. 1, sec. 7, (2) “person” includes a corporation, no change in the sense occurs.

2. The insertion of a prohibition against operating at all, until leave has been obtained from the Minister. Under the former Act, if notice of the purchase was given to the Minister, the purchaser might operate meanwhile.

3. The power conferred upon the Minister, in case the purchaser is refused incorporation at the next session of Parliament, to extend the right to operate until the following session. Other changes in the wording also appear, but need not be set out here.

The Railway Act, in common with almost all similar legislation, contemplates the construction and operation of railways exclusively by corporations, and, as stated in *Reg. v. Train*, 3 F. & F. 22, the legal carrying out of such a scheme can only be effected by authority of Parliament. This principle is well explained in Abbott on Railways, p. 1, as follows: “In other words, the legislative authority is required to protect railway companies from the consequences of the doing of that which would otherwise amount to a public nuisance.”

The consequence is that, but for some such provisions as those contained in this section, no one but a company having power to operate the railway about to be sold, could afford to buy it, and the market would therefore be exceedingly limited if indeed it existed at all. This provision obviates the difficulty by creating machinery for the temporary operation of the railway, until the necessary legislation can be acquired. An instance of a railway being assigned to individuals and constructed and operated by them, under special legislation will be found in *Hamilton v. Covert*, 16 U.C.C.P. 205.

There does not appear to be any right to foreclose a mortgage upon a railway, and it was held that prior to 46 Vict., ch. 24 (D.), enacting the above section, there was no right to authorize a sale of it, as it could not be operated apart from its charter, and it would be contrary to public policy to allow a sale when

it would amount to a virtual shutting down of the enterprise: *Galt v. Erie & Niagara R.W. Co.*, 14 Gr. 499, and see *Redfield v. Wickham*, 13 A.C. 467. The latter case, however, decided that this section authorizes a sale either under a mortgage deed or under execution, but the Courts of one province cannot authorize the sale of a railway where part of it is without the jurisdiction: *Grey v. Manitoba & North Western R.W. Co.*, 11 Man. L.R. 42, (1897), A.C. 254. In *Redfield v. Wickham*, *supra*, at p. 476, Lord Watson says: "They, (the sections originally enacted), do not suggest that according to the policy of Canadian Law, a statutory railway undertaking can be disintegrated by piecemeal sales at the instance of judgment creditors or incumbrancers; but they clearly show that the Dominion Parliament has recognized the rule that a railway or section of a railway may, as an integer, be taken in execution and sold like other *immeubles* in ordinary course of law."

In *Toronto General Trusts Corporation v. Central Ontario R. W. Co.*, 8 O.L.R. 342, it was laid down by the Court of Appeal affirming Boyd, C., that a railway incorporated by provincial legislation and which has since been declared to be a "work for the general advantage of Canada," can since the passing of the Act 46 Vict., cap. 24, secs. 14, 15 and 16, (D) (the original of the above section), be validly sold as a going concern, where the sale is under a mortgage or at the instance of holders of bonds secured by a mortgage on the railway, made before or after the passing of that Act or under any other lawful proceeding.

Railway Constables.

Appoint-
ment of
railway
con-
stables.

241. Any two justices of the peace, or a stipendiary or police magistrate, in the provinces of Ontario, Nova Scotia, New Brunswick, British Columbia, Prince Edward Island, or Manitoba or the district of Keewatin, and any judge of the Court of King's Bench or Superior Court, or clerk of the Peace, or clerk of the Crown, or judge of the Sessions of the Peace, in the province of Quebec, and any judge of the Supreme Court, or two justices of the peace, in the North-west Territories, and any commissioner of a Parish Court in the pro-

vince of New Brunswick, within whose several jurisdictions the railway runs, may, on the application of the company or any clerk or agent of the company, appoint any persons recommended for that purpose by such company, clerk or agent, to act as constables on and along such railway; and every person so appointed shall take an oath or make a solemn declaration, which may be administered by any judge or other official authorized to make the appointment or to administer oaths, in the form or to the effect following, that is to say :—

“I, A.B., having been appointed a constable to act upon and along (here name the railway), under the provisions of *The Railway Act, 1903*, do swear that I will well and truly serve our Sovereign Lord the King in the said office of constable, without favour or affection, malice or ill-will, and that I will to the best of my power, cause the peace to be kept, and prevent all offences against the peace; and that, while I continue to hold the said office, I will, to the best of my skill and knowledge, discharge the duties thereof faithfully, according to law. So help me God.” 51 V., c. 29, s. 281, Am.

Such appointment shall be made in writing signed by the official making the appointment, and the fact that the person appointed thereby has taken such oath or declaration shall be endorsed thereon by the person administering such oath or declaration.

2. Every constable so appointed, who has taken such oath or made such declaration, may act as a constable for the preservation of the peace, and for the security of persons and property against unlawful acts on such railway, and on any of the works belonging thereto, and on and about any trains, roads, wharfs, quays, landing places, warehouses, lands and premises belonging to such company, whether the same are in the county, city, town, parish, district or other local jurisdiction within which he was appointed, or in any

other place through which such railway passes or in which the same terminates, or through or to which any railway passes which is worked or leased by such company, and in all places not more than a quarter of a mile distant from such railway, and shall have all such powers, protections and privileges for the apprehending of offenders, as well by night as by day, and for doing all things for the prevention, discovery and prosecution of offences, and for keeping the peace, which any constable duly appointed has within his constableness. 51 V., c. 29, s. 282, Am.

Protection.
Arrest of offenders.

3. Any such constable may take such persons as are punishable by summary conviction for any offence against the provisions of this Act, or of any of the Acts or by-laws affecting the railway, before any justice or justices appointed for any county, city, town, parish, district or other local jurisdiction within which such railway passes; and every such justice may deal with all such cases, as though the offence had been committed and the persons taken within the limits of his jurisdiction. 51 V., c. 29, s. 283, Am.

Dismissal
of constables.

4. Any county court judge, or stipendiary police magistrate, in either of the provinces of Ontario, Nova Scotia, New Brunswick, British Columbia, Prince Edward Island, or Manitoba, or in the district of Keewatin, and any judge of the Court of King's Bench or Superior Court, or judge of the Sessions of the Peace, in the province of Quebec, and any judge of the Supreme Court in the North-West Territories, may dismiss any such constable who is acting within their several jurisdictions; and the company, or any clerk or agent of such company, may dismiss any such constable who is acting on such railway; and upon every such dismissal, all powers, protections and privileges which belonged to any such person by reason of such appointment, shall wholly cease; and no person so dismissed shall be again appointed or act as constable for such railway, without the consent of the authority by whom he was dismissed. 51 V., c. 29, s. 284, Am.

By
courts.

By authorized
officers of
company.

May not
be re-
appointed
without
consent.

5. The company shall cause to be recorded in the office of the clerk of the peace, for every county, parish, district or other local jurisdiction in which such constable is appointed, the name and designation of every constable so appointed at its instance, the date of his appointment, and the authority making it, with such appointment or a certified copy thereof, and also the fact of every dismissal of any such constable, the date thereof, and the authority making the same, within one week after the date of such appointment or dismissal, as the case may be; and such clerk of the peace shall keep a record of all such facts in a book which shall be open to public inspection, and shall be entitled to a fee of fifty cents for each entry of appointment or dismissal, and twenty-five cents for each search or inspection, including the taking of extracts. Such record shall, in all courts, be *prima facie* evidence of the due appointment of such constable and of his jurisdiction to act as such without further proof than the mere production of such record. 51 V., c. 29, s. 285, Am.

*6. Every such constable who is guilty of any neglect or breach of duty in his office of constable, shall be liable on summary conviction thereof, within any county, city, district or other local jurisdiction wherein such railway passes, to a penalty not exceeding eighty dollars, or to imprisonment, with or without hard labour, for a term not exceeding two months. Such penalty may be deducted from any salary due to such offender, if such constable is in receipt of a salary from the company. 51 V., c. 29, s. 286.

This clause consolidates the earlier legislation on the subject and makes some useful changes. For instance, any clerk or agent of the railway, who, under sub-section 1, may recommend railway constables, had formerly to be authorized by the directors of the company so that in cases of emergency some delay frequently occurred in their appointment. Under section 285 of the former Act, the appointment had also to be recorded in the office of the Clerk of the Peace for every county or local

jurisdiction through which the railway passes. This was a practical impossibility, and now the record is kept in one office only, namely, that for the county in which the officer is appointed: sub-section 5, *supra*.

It is worthy of remark that railway constables may arrest offenders on the railway and by sub-section 3, may take them before any Justice of the Peace in any jurisdiction through which the railway passes, and are not compelled to bring them for trial only before magistrates of the county in which the offence was committed. This provision applies only to cases where persons are arrested and taken before a magistrate; and so where a person, walking on a railway track in Toronto, was *summoned* to appear before a justice for the County of York, who convicted him, the conviction was quashed: *Reg. v. Hughes*, 26 O.R. 486. Where a railway constable makes an arrest and carries on a prosecution, there must be evidence to connect the railway company with him so as to show agency or ratification in order to render it liable in an action for malicious prosecution: *Dennison v. Canadian Pacific R.W. Co.*, 3 Can. Ry. Cas. 368.

Actions for Damages.

Limita- tion of action for damages.	242. All actions or suits for indemnity for any damages or
Plead- ings.	injury sustained by reason of the construction or operation of
Proof.	the railway shall be commenced within one year next after the
	time when such supposed damage is sustained, or if there is con-
	tinuation of damage within one year next after the doing or
	committing of such damage ceases, and not afterwards; and the
	defendants may plead the general issue and give this Act and
	the Special Act and the special matter in evidence at any trial
	to be had thereupon, and may prove that the same was done in
	pursuance of and by the authority of this Act or of the Special
	Act. 51 V., c. 29, s. 287.

This section has been amended chiefly by substituting for the words "sustained by reason of the railway" the words "by reason of the construction or operation of the railway."

Limitation of Actions. This section comes down from the earliest consolidations and its prototype exists in special charters

conferred prior to 1851, when the first general Railway Act, 14 & 15 Vict., cap. 51, was passed. In the consolidations down to R.S.C. cap. 109, sec. 27, the limitation given was six months, and this is still the period required by R.S.O. 1897, cap. 207, sec. 42, (1) for provincial railways; but by 51 Vict., cap. 29, sec. 287, it was extended to one year, in the case of Dominion railways.

It has been said that this clause is unconstitutional because, limitations and pleading are matters of procedure, and therefore for the provinces; but so far its constitutionality has been upheld: *Zimmer v. Grand Trunk R.W. Co.*, 19 A.R. 693; *Levesque v. New Brunswick R.W. Co.*, 29 N.B.R. 588, at pp. 604 and 613; though its validity was doubted by some of the judges in *McArthur v. Northern Pacific R.W. Co.*, 15 O.R. 733, 17 A.R. 86, and *Anderson v. Canadian Pacific R.W. Co.*, 17 A.R. 480. At this date, however, in view of the many cases in which its validity has been assumed, it would be somewhat difficult to set it aside. Some doubts have arisen upon the meaning of the words "damages sustained by reason of the railway," and though the interpretation of the section has been made much easier by the present statute through the insertion of the words "construction or operation" in line two, a review of the cases on the subject will be useful. Thus in the North-West Territories it was held that where goods lying in a railway freight shed were destroyed by fire, such loss was due to damage done by reason of the railway, and the limitation of six months applied: *Walters v. Canadian Pacific R.W. Co.*, 1 Terr. L.R. 88. If, however, this last mentioned action is to be treated as one based upon contract, it would seem to be somewhat in conflict with *Anderson v. Canadian Pacific R.W. Co.*, 17 O.R. 747, 17 A.R. 480, where Rose, J., at the trial and a Divisional Court held in an action for passengers' baggage, that this limitation clause does not apply to actions arising "out of contract but to actions for damages occasioned by the company in the execution of the powers given or assumed by them to be given for enabling them to maintain their railway." This judgment was affirmed by the Court of Appeal in 17 A.R. 480, but no extended reasons were given, and the only reference to the point is to the effect that Osler, J., thought that the section did not apply to an action of contract. Owing to the varying views that have prevailed, perhaps the best explanation of the section can be furnished by setting out chronologically the chief

cases in which the point has been discussed. In *Roberts v. Great Western R.W. Co.* (1857), 13 U.C.R. 615, it was decided that the similar limitation clause then in force applied to actions for damages occasioned in the exercise of the powers given to the company enabling them to construct and maintain their road, but not to claims for negligence in carrying passengers, that being a description of business that any individual might be engaged in without requiring legislative sanction for the taking or using of property of others against their will. This case was followed and discussed in *Anderson v. Canadian Pacific R.W. Co.*, *supra*. In *Follis v. The Port Hope, etc., R.W. Co.* (1859), 9 U.C.C.P. 50, an action for trespass committed by a railway during and as part of its construction was held to be within the limitation clause; as was also an action for the destruction of a horse by running over it in *Auger v. Ontario, Simcoe & Huron R.W. Co.* (1859), *ibid.*, p. 164. In this last mentioned case Richards, J., at page 169, says: "There is no doubt the Courts have held repeatedly that the limitation clauses do not apply where the companies are carrying on the business of common carriers, even in those cases where they are permitted by their Act of incorporation to use locomotives, etc., for the conveyance of passengers and goods, etc., and to charge for such conveyance, but the liability arises in those cases from the breach of contract arising from their implied undertaking to carry safely and to take proper care of the goods, etc.

"The same principle does not apply in these cases; the right of the plaintiff does not rest in any way on contract, but is strictly an action of tort against defendants for an alleged wrong done by them in exercising the powers conferred upon them by the Act."

Where the action was for damages resulting from a collision with plaintiff's waggon, the negligence alleged being a failure to give the proper signals and also a defect in a level crossing, the limitation clause was applied: *Browne v. Brockville & Ottawa R.W. Co.* (1860), 20 U.C.R. 202. Where damage results to plaintiff on account of a failure to erect fences, the limitation applies: *Brown v. Grand Trunk R.W. Co.* (1865), 24 U.C.R. 350; *Levesque v. New Brunswick R.W. Co.* (1889), 29 N.B.R. 588. Where fire was set by a locomotive on railway premises and the negligence charged was in the failure to keep it off an adjoining

owner's lot, it was held that this was merely a breach of duty owed by one landowner to another, and was quite independent of any user of the railway, and the limitation did not apply: *Prendergast v. Grand Trunk R.W. Co.* (1866), 25 U.C.R. 193; but where the action was for negligently allowing dry wood and leaves to accumulate on the track, a contrary view was taken, and an action brought after the statutory period was held to be barred: *McCallum v. Grand Trunk R.W. Co.* (1870), 30 U.C.R. 122; (1871), 31 U.C.R. 527. The *Prendergast Case* was there distinguished. In *Tench v. Great Western R.W. Co.* (1872), 32 U.C.R. 452, the action was for a libel uttered by defendants' general manager against a conductor, and it was held that such an action was not for damage done by reason of the railway. This decision was reversed in 1873 by a judgment reported in 33 U.C.R. 8, but the point in question was not specifically dealt with, and a disposition of it was unnecessary owing to the different view of the cause of action entertained in the appeal. Where an action was brought against a railway company because its contractor took gravel from a highway, it was held that the company were liable for the trespass, and that the limitation clause did not apply, the wrong complained of being an illegal act not necessarily connected with the construction of the railway more than the appropriation of any other property to their use: *Township of Brock v. Toronto and Nipissing R.W. Co.* (1875), 37 U.C.R. 372. The case of *Follis v. Port Hope, etc., R.W. Co.*, *supra*, was referred to and distinguished. Where a street railway car was driven so rapidly that plaintiff, in jumping to escape it, was injured, it was held that the injuries thus sustained were damages done by reason of the railway and the limitation applied. Moss, C.J.O., and Burton, J.A., thought that they were bound by the *Auger* and *Browne Cases*, *supra*, and would apparently have decided differently but for them, while Patterson, J.A., felt that the case was clearly within the section: *Kelly v. Ottawa Street R.W. Co.* (1879), 3 A.R. 616.

The case of *Brock v. Toronto and Nipissing R.W. Co.*, *supra*, was followed in *Beard v. Credit Valley R.W. Co.* (1885), 9 O.R. 616, where the action was for trespass in wrongfully taking earth off plaintiff's land.

Injuries to machinery which the railway company were carrying, due to careless handling, are not within the statute, the claim being for breach of contract: *Whitman v. Western Counties R.W.*

Co. (1884), 17 N.S.R. 405; but in *May v. Ontario and Quebec R.W. Co.* (1885), 10 O.R. 70, injuries inflicted upon a workman employed by a railway company while being carried to his work, were held to be within the section, and it was also decided that "any damage done through negligence upon a railway in the carriage of passengers and the like, is damage done by reason of the railway," provided it is done "in the course and prosecution of their business as a railway company constituted in pursuance of" the authority of any statute: *Wilson, C.J.*, at p. 77. Where a passenger on a Credit Valley Railway car was killed in a collision with a Grand Trunk Railway engine, it was decided that the limitation of six months then prescribed by the Railway Act prevailed over the limitation of twelve months prescribed by the Fatal Accidents Act, R.S.O. 1877, cap. 128, sec. 5: *Conger v. Grand Trunk R.W. Co.* (1887), 13 O.R. 160, following *Cairns v. Water Commissioners of Ottawa* (1875), 25 U.C.C.P. 551. Where timber was cut by a railway company on lands adjoining its track, in pursuance of its statutory powers in that behalf, Mr. Justice Street held that the resulting cause of action was for damage done by reason of the railway, and was barred after the statutory period had expired: *McArthur v. The Northern and Pacific Junction R.W. Co.* (1886), 15 O.R. 733. This decision was affirmed on appeal by a divided Court: (1890), 17 A.R. 86. Then follows the case of *Anderson v. Canadian Pacific R.W. Co.* (1889), 17 O.R. 747; (1890), 17 A.R. 480, already discussed, after which the next decision, which may be considered to be applicable to all the provinces, though based upon the law of Quebec, is *North Shore R.W. Co. v. McWillie* (1890), 17 S.C.R. 511, affirming *McWillie v. North Shore R.W. Co.* (1889), M.L.R. 5 Q.B. 122, in which it was stated by Mr. Justice Gwynne, though not expressly dealt with by the other members of the Supreme Court, that the "damage" referred to in the clause in question has no reference to such an action, which was for damage not occasioned by reason of the railway, but by reason of sparks being suffered to escape from an engine running upon it through the default and neglect of the company whose engine caused the damage, and that such damage is "no more damage sustained by reason of the railway than damage to goods being carried upon the railway by reason of negligence in the manner of running a train is:" see page 514. This opinion is not in accord with the judgment of the Court in the *McCallum Case*, *supra*, and it is

doubtful whether it can be accepted as authority in preference to that case where the cause of action arises in provinces other than Quebec, unless and until the principle is reaffirmed by the Supreme Court in some case where the point squarely arises. The wording of the present section apparently in effect overrules this case.

In *Zimmer v. Grand Trunk R.W. Co.* (1892), 21 O.R. 628, Mr. Justice Robertson decided that the clause as embodied in 51 Vict., cap. 29, sec. 287, applied to the Grand Trunk Railway Company; but, though his judgment was affirmed upon other grounds by the Court of Appeal in 19 A.R. 693, the Court decided, contrary to his view, that where the cause of action arose through failure to repair a highway bridge over defendants' railway, which it was the latter's duty to maintain, the damage was not "sustained by reason of the railway," and that the limitation clause did not apply. Though the case of *Conger v. Grand Trunk R.W. Co.*, *supra*, was cited in argument, it was also held in the *Zimmer Case*, without referring to the earlier decisions, that the limitations in the Railway Act are inapplicable to cases of injuries brought under Lord Campbell's Act or the Workmen's Compensation for Injuries Act, and that in cases of conflict the latter must govern. As the last decision is a judgment of the Court of Appeal, while that in the *Conger Case* was delivered by single Judge (O'Connor, J.), upon a demurrer, the latter case appears to be in effect overruled. Mr. Justice Osler, at page 703 of the report in *Zimmer v. Grand Trunk R.W. Co.*, quotes the remarks of Mr. Justice Gwynne in *North Shore R.W. Co. v. McWillie*, already referred to, with approval, and says: "It (the accident) happened solely by reason of a part of the municipal highway which the defendants were, under the circumstances, bound to keep in repair, being negligently allowed by them to be out of repair, and can with less propriety be said to be damage sustained by reason of the railway than can damage caused by a breach of their statutory duty as carriers of goods."

Levesque v. New Brunswick R.W. Co. (1889), 29 N.B.R. 588, has been already referred to, and the last Ontario case to be mentioned is *Hendrie v. Onderdonk* (1898), 34 Canada L.J. 414, in which it was decided that a contractor for a railway incorporated by the Legislature of Ontario, and first working under the Ontario Railway Act, but which was subsequently declared

to be a work for the general advantage of Canada, was as much entitled to the benefit of the shorter limitation clause of the Ontario Act as the railway company itself.

In *Findlay v. Canadian Pacific R.W. Co.*, 2 Can. Ry. Cas. 381; it was held that the limitation applied to actions founded on the commission of acts, not to those based on the omission of duties, which defendants were bound to perform and so, where a railway ditch was left unguarded, Richardson, J. thought that the section would not apply.

The effect of the changes made in the present statute, is to limit all actions based upon a wrongful construction or operation of the railway, but not, under sub-section 2, to permit such a limitation in cases of contract, nor in actions based upon a breach of the company's duty respecting tolls.

Pleading—Not Guilty by Statute.

This is a convenient plea which, while now seldom seen, may be set up in several instances; and is yet frequently used by railways where the action is a simple one for negligence in the exercise of their statutory powers.

The plea itself is statutory in its origin and very old. For instance it is provided by 7 Jac. 1, ch. 5, "that if any action shall be brought against any constable for any matter or thing by him done by virtue or reason of his office, it shall be lawful for him to plead the general issue and to give such special matter in evidence to the jury which shall try the cause, which special matter being pleaded had been a good and sufficient matter in law to have discharged the defendant of trespass." See *Brown v. Shea*, 5 U.C.R. 141.

This privilege was given to railways in Ontario at a very early period, as, for instance, in the London and Gore Railroad Company's Act, 4 Wm. IV., ch. 29, sec. 26, passed March 6th, 1834, where the right to plead the general issue and plead the special Act and prove the special matter at the trial was conferred in terms very similar to those yet used in 51 Vict., ch. 29, sec. 287, (Dom.) and R.S.O. ch. 207, sec. 42 (1).

The statute can only be pleaded where the action is one for damage done "by reason of the railway," and, therefore, would not enable the latter to set up a defence to an action brought for

breach of a special agreement made by it irrespective of the statutory powers conferred upon it: *Pew v. The Buffalo and Lake Huron R.W. Co.*, 17 U.C.R. 282, but where damage was alleged to have been caused by reason of imperfect fences and cattle guards, this was held to constitute "damage done by reason of the railway," and the plea was upheld: *Levesque v. New Brunswick R.W. Co.*, 29 N.B.R. 588, at p. 596.

The railway company may, under this plea, dispute the plaintiff's title to land where he is suing for damages in respect of it, but in the absence of some dispute about the title, it does not throw the onus upon the plaintiff of proving it: *Ball. v. Grand Trunk R.W. Co.*, 16 U.C.C.P. 252.

All statutes relied upon should appear in the margin: *Edwards v. Hodges*, 15 C.B. 477; *Van Natter v. Buffalo, etc.*, *R.W. Co.*, 27 U.C.R. 581.

If a railway company as a carrier desired to plead the general issue, it would, perhaps, still be entitled to do so, but it would thereby admit the receipt of the goods under a contract to carry safely, and the plea would merely operate as a denial of the loss by the railway company's negligence: *Webb v. Page*, 6 Scott N.R. 951; *Elwell v. Grand Junction R.W. Co.*, 5 M. & W. 669, 8 Dowl. 225; Chitty Pleading, 3rd ed., 378 and 685. Nor can such a plea be employed in an action for specific performance: *Peterborough v. Midland R.W. Co.*, 12 P.R. 127. Nor could it be pleaded even before the present enactment, where, as is usually the case, a railway company carries goods under a special contract: *ibid*—but under this plea, it is open to a railway company to give evidence of contributory negligence: *Doan v. Michigan Central R.W. Co.*, 17 A.R. 481; *Rowan v. Toronto R.W. Co.*, 29 S.C.R. at p. 721; *Levesque v. New Brunswick R.W. Co.*, 29 N.B.R. 588, at p. 594.

Formerly particulars were ordered under the authority of *Jennings v. Grand Trunk R.W. Co.*, 11 P.R. 300, but this case is now overruled by *Taylor v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 523, and provided the plea is in itself proper, the various denials of the plaintiff's right to recover, on which the railway company relies, need not be set forth in detail.

The form in which the plea is now raised by setting out the statutes and sections relied upon was introduced in England by Rule 21, T.T. 1853, and in Ontario by Rule 21, T.T. 1856. In

Ontario the rules now governing the point are rules 286, 287 and 288. Formerly no other plea could be joined with it: *O'Donohoe v. Maguire*, 1 P.R. 131; *Dale v. Coon*, 2 P.R. 160, but by the Common Law Procedure Act, 1856, sec. 156, the court was empowered to grant leave to set up several pleas; this rule being continued as to the pleas now under consideration, down to Rule 417, of 1888, but this proviso does not appear in the present Rule 286, and it becomes a question whether the old practice forbidding the joinder of any other plea has been thereby renewed or whether the general latitude allowed in modern pleading extends to this case so that other pleas may now be set up without leave.

Certain
actions
excepted.

2. Nothing in this section shall apply to any action brought against the company upon any breach of contract, express or implied, in the carriage of any traffic nor to any action against the company for damages under any section of Part XI. of this Act, respecting tolls.

This is new and as mentioned in the notes to sub-section 1, it sets at rest some questions which were in doubt under earlier legislation as to whether the limitation prescribed by it applied to actions based upon contract.

Inspection not
to relieve
company
from
liability.

3. No inspection had under this Act, and nothing in this Act contained, and nothing done or ordered or omitted to be done or ordered, under or by virtue of the provisions of this Act, shall relieve, or be construed to relieve, any company of or from any liability or responsibility resting upon it by law, either towards His Majesty or towards any person, or the wife or husband, parent or child, executor or administrator, tutor or curator, heir or personal representative, of any person, for anything done or omitted to be done by such company, or for any wrongful act, neglect or default, misfeasance, malfeasance or nonfeasance, of such company, or in any manner or way to lessen such liability or responsibility, or in any way to weaken or diminish the liability or responsibility of any such company, under the laws in force in the province in which such liability or responsibility arises. 51 V., c. 29, s. 288.

This sub-section appeared as a separate section in the Act of 1888, under the heading "Company not relieved from legal liability by inspection or anything done hereunder." It was first enacted in 20 Vict., cap. 12, sec. 17, being part of "an Act for the better prevention of accidents on railways," and in *Girouard v. Canadian Pacific R.W. Co.*, (in Quebec), 1 Can. Ry. Cas. 343, it was cited in support of a judgment requiring greater precautions at highway crossings than those prescribed by the Act. See notes to section 224 on "Signals at Common Law." It was also employed in *Canadian Pacific R.W. Co. v. Roy*, 1 Can. Ry. Cas. 196, as the basis for an argument that, despite the general effect of the Railway Act in other provinces, that statute had not the effect of repealing or altering the civil law in force in Quebec, in respect to fires set by railways. As to this the Lord Chancellor says at p. 207, "Section 288 is more plausibly argued to have maintained the liability of the company, notwithstanding the statutory permission to use the railway, but if one looks at the heading under which that section is placed, and the great variety of provisions which give ample materials for the operation of that section, it would be straining the words unduly to give it a construction which would make it repugnant, and authorize in one part of the statute what is made actionably wrong in another. It would reduce the legislation to an absurdity, and their Lordships are of opinion that it cannot be so construed."

While the section may have been exceedingly valuable in its original surroundings in an Act passed for the prevention of accidents, its value in a general railway enactment, which provides ample penalties and civil remedies elsewhere, for breaches of its requirements, is not apparent, and as its existence has, in the only two cases in which it has been mentioned, given rise to misconception, it is a question whether it might not better have been left out.

PART X.

BY-LAWS, RULES AND REGULATIONS, 243-250.

- Company's by-laws respecting— **243.** The company may, subject to the provisions and restrictions in this and in the Special Act contained, make by-laws, rules or regulations respecting—
- Speed. (a.) the mode by which, and the speed at which, any rolling stock used on the railway is to be moved;
- Time-tables. (b.) the hours of the arrival and departure of trains;
- Loads. (c.) the loading or unloading of cars, and the weights which they are respectively to carry;
- Freight regulations. (d.) the receipt and delivery of traffic;
- Nuisances. (e.) the smoking of tobacco, expectorating, and the commission of any nuisance in or upon trains, stations, or other premises occupied by the company;
- Traffic and operation. (f.) the travelling upon, or the using or working of, the railway;
- Conduct. (g.) the employment and conduct of the officers and employees of the company; and—
- Management. (h.) the due management of the affairs of the company. 51 V., c. 29, s. 214, Am.

With these provisions should be compared the power conferred upon directors by section 86, *ante*, to pass by-laws for the internal management of the company, and notes to that section.

The above enactment is in effect the same as section 214 of the former Act. The word "traffic" in sub-section (d.) has been substituted for "goods and other things which are to be conveyed upon such carriages," and is now wide enough to include passengers: section 2, (z.) *ante*. The word "expectorating" is now added after "tobacco" in clause (e.). Corresponding English legislation exists in 3 and 4 Vict., cap. 99, secs. 7, 8 and 9, and in 8 Vict., cap. 20, secs. 108, 109, 110 and 111.

The effect of by-laws of this character upon the public was considered in *London Ass'n, etc., v. London & India Docks* (1892), 3 Ch. 242; which was a case where by-laws were enacted and circulated regulating the use of defendants' docks without obtaining the necessary approval required by statute. Plaintiffs having brought an action to declare these by-laws illegal, it was held that, as they could show no special damage to themselves as individuals, they had no *locus standi*; as such an action should have been brought by the Attorney General as representing the public.

It was held, however, that as the by-laws had not been properly approved they were not binding, except so far as the plaintiffs or other customers may have accepted them. At p. 252, Lindley L.J., says: "This power of making by-laws is something very different from the power which every owner of property has of making agreements with those persons who may desire to use it. A by-law is not an agreement, but a law binding on all persons to whom it applies, whether they agree to be bound by it or not. All regulations made by a corporate body and intended to bind not only themselves and their officers and servants, but the members of the public who come within the sphere of their operation, may be properly called "by-laws" whether they be valid or invalid in point of law; for the term by-law is not restricted to that which is valid in point of law." This was quoted with approval in *Barracrough v. Brown* (1897), A.C. 615, at p. 624. In *Kruse v. Johnston* (1898), 2 Q.B. 91, at p. 99, Lord Russell draws a distinction between by-laws passed by public representative bodies and those passed by "railway companies, dock companies or other like companies, which carry on their business for their own profit although incidentally for the advantage of the public. In this class of cases it is right that the Courts should jealously watch the exercise of these powers and guard against their unnecessary or unreasonable exercise to the

public disadvantage." He thinks that those by-laws passed by local governing bodies should be "benevolently" interpreted; but even in such cases if they were partial or unequal, manifestly unjust, disclosed bad faith, or involved oppressive or gratuitous interference with the rights of those subject to them, they would be deemed to be unreasonable and *ultra vires*, but otherwise effect should be given to them, even though in the opinion of individual judges, they went further than was prudent or necessary. But by-laws should be clear and definite and free from ambiguity and should not make unlawful, things which are otherwise innocent: *Scott v. Pilliner* (1904), 2 K.B. 855, at p. 858; see *Queen v. Levy*, 30 O.R. 403.

Where a navigation company was empowered to make by-laws for the good government of the company, the good and orderly using of navigation and for the well-governing of the boatmen, etc., carrying goods, this was construed to mean only that it could enact by-laws for the orderly use of navigation so as to best secure the convenience of the public and that they could not make rules respecting "the regulation of moral or religious conduct, which are left to the general law of the land and to the law of God;" and therefore, they could not enforce a "Sabbath observance" regulation passed by them: *Calder v. Pilling*, 14 M. & W. 76. Where by-laws are authorized for the protection of the company, as is the case in England, of by-laws imposing penalties for non-payment of fare and production of a ticket, the company must, in order to avail itself of them, keep strictly within their provisions: *Jennings v. Great Northern R. W. Co.*, L.R. 1 Q.B. 7, and if a by-law requires evidence of fraud, the penalties for non-observance of it, cannot be exacted unless fraud is shown: *Dearden v. Townsend*, *ib.*, 10, and any by-law enacted in terms wider than those authorized by the statute under which it is passed, will be invalid: *Dearden v. Townsend*. So also must all conditions precedent to the enforcement of the penalties be proved: *Brown v. Great Eastern R.W. Co.*, 2 Q.B. D. 406, and see *Bentham v. Hoyle*, 3 Q.B.D. 289.

In *Saunders v. South Eastern R.W. Co.*, 5 Q.B.D. 456, Cockburn, C.J., at p. 459, in discussing the corresponding clauses of the English Act, thought that they had reference to a time when railways were compelled to permit the use of their lines by locomotives and carriages other than their own and that the pro-

visions for regulating the rate of speed, the starting and stoppage of trains, the receipt and delivery of goods, the loading and unloading of cars, and the weight which they were to carry, and the travelling upon and using the railway, all had reference to the use of the line by others, because, as regards its own rolling stock, trains and traffic a company had ample power to regulate it without recourse to the statute; and on that account he thought, though it was not decided, that the clause corresponding to clause (f) above had no reference to the case of persons travelling in the company's own carriages. In view of other decisions noted herein, this view though perhaps historically correct, would hardly apply to railways operating under existing conditions. If a by-law is in part repugnant to the statute under which it was passed, the whole of it is invalid: *Dyson v. London, etc., R.W. Co.*, 7 Q.B.D. 32, and see *Huffam v. North Staffordshire R.W. Co.* (1894), 2 Q.B. 821. A by-law passed under proper legislative authority requiring a person to deliver up a ticket or pay his fare and imposing a penalty for disobedience is reasonable and if a person who got a ticket, loses it and refuses to pay his fare over again and is convicted, the conviction will be upheld: *Hanks v. Bridman* (1896), 1 Q.B. 253; *Lowe v. Vulp* (1896), 1 Q.B. 256. Where a statute empowered a company to pass by-laws prohibiting a nuisance in their cars, and they enacted that "no person shall swear or use offensive or obscene language whilst in or upon any carriage," the by-law was upheld even though it did not contain any such additional words as "so as to be a nuisance or annoyance to others." The case of *Strickland v. Hayes* (1896), 1 Q. B. 290, dealing with the same subject was discussed and distinguished: *Gentel v. Rapps* (1902), 1 K.B. 161. No by-law would be open to the objection that it is unreasonable if it is in the very terms of the enabling Act: *Queen v. Petersky*, 4 B.C.R. 385.

244. The company may, for the better enforcing the observance of any such by-law, rule or regulation, thereby prescribe a penalty not exceeding forty dollars for any violation thereof. ^{Penalty for violation of by-laws.}
51 V., c. 29, s. 215.

By section 300, sub-section 1, where any penalty is one hundred dollars or less it may be recovered on summary conviction before a Justice of the Peace. This is similar to the English

legislation, 8 Vict., cap. 20, sec. 145; and under it, the case of *London, etc., R.W. Co. v. Watson*, 4 C.P.D. 118, decided that such penalties must be recovered in the manner pointed out in the Act, and not by action in the County Court, see also *Reg. v. Paget*, 8 Q.B.D. 151.

Essentials
to valid-
ity of
by-law.

245. All by-laws, rules and regulations whether made by the directors or the company shall be reduced to writing, be signed by the chairman or person presiding at the meeting at which they are adopted, have affixed thereto the common seal of the company, and be kept in the office of the company. 51 V., c. 29, s. 216, Am.

Under R.S.M. cap. 100, sec. 336, a similar provision of the Municipal Act was held to be imperative and an instrument not sealed or signed as provided by statute would not be a by-law: *Re Municipality of Whitewater*, 14 Man. L.R. 153.

Must be
approved
by
Governor
in Coun-
cil.

Board to
report.

246. All such by-laws, rules and regulations, except such as relate to tolls and such as are of a private or domestic nature and do not affect the public generally, shall be submitted to the Governor in Council for approval. The Governor in Council, having first obtained the report of the Board thereon, which report it shall be the duty of the Board to make, may sanction them or any of them, or any part thereof, and may, from time to time, rescind the sanction of any such by-law, rule or regulation, or of any part thereof. Except when so sanctioned no such by-law, rule or regulation shall have any force or effect. 63-64 V., c. 23, s. 9, Am.

This requirement is also no doubt essential, see *Village of Pointe Gatineau v. Hanson*, Q.R. 10 K.B. 346.

Publica-
tion of
by-laws,
etc.

247. A printed copy of so much of any by-law, rule or regulation, as affects any person, other than the shareholders, or the officers or employees of the company, shall be openly affixed, and kept affixed, to a conspicuous part of every station belonging to the company, so as to give public notice thereof to the

persons interested therein or affected thereby; and in the province of Quebec, such notice shall be published both in the English and French languages. 51 V., c. 29, s. 218.

2. A printed copy of so much of any by-law, rule or regulation as relates to the conduct of or affects the officers or employees of the company, shall be given to every officer and employee of the company thereby affected; and in the province of Quebec the same shall be published both in the English and French languages. 51 V., c. 29, s. 219.

Publication of
by-laws,
etc.,
affecting
employees

In order to convict any one guilty of a breach of the by-law, it would no doubt only be necessary to prove publication of the by-law at such places and in such manner, conformably with the statute, as would affect the person accused with notice of it: *Motterman v. Eastern Counties R.W. Co.*, 7 C.B.N.S. 58.

248. Such by-laws, rules and regulations when so approved shall be binding upon, and observed by, all persons, and shall be sufficient to justify all persons acting thereunder. 51 V., c. 29, s. 220.

By-laws,
etc., bind-
ing when
approved.

249. If the violation or non-observance of any by-law, rule or regulation, is attended with danger or annoyance to the public, or hindrance to the company in the lawful use of the railway, the company may summarily interfere, using reasonable force, if necessary, to prevent such violation, or to enforce observance, without prejudice to any penalty incurred in respect thereof. 51 V., c. 29, s. 221, Am.

Summary
inter-
ference in
certain
cases.

250. A copy of any by-law, rule or regulation, certified as correct by the president, secretary or other executive officer of the company and bearing the seal of the company, shall be evidence thereof in any court. 51 V., c. 29, s. 222.

Evidence.

PART XI.

TOLLS.

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Tolls—By-laws.

By-laws
to be
passed
author-
izing
issue of
tariffs
of tolls
to be
charged
by the
company.

251. The company or the directors of the company, by by-law, or any such officer or officers of the company as are thereunto authorized by by-law of the company or directors, may from time to time prepare and issue tariffs of the tolls to be charged, as hereinafter provided, for all traffic carried by the company upon the railway, or in vessels, and may specify the persons to whom, the place where, and the manner in which, such tolls shall be paid.

Sub-section 1. The corresponding section 223, of the former Act (1888), authorized the company or its directors to *fix and regulate* the tolls, etc. This power has been taken away, and power is merely given to prepare and issue tariffs of the tolls which may be charged when approved by the Board (sub-section 4). See interpretation clause 2, for the meaning of "tolls" and "traffic." In the former section, "steam vessels" was used in this connection.

2. All such by-laws shall be submitted to and approved by the Board. To be approved by Board.

3. The Board may approve such by-laws in whole or in part, or may change, alter or vary any of the provisions therein. Board may approve in whole or in part.

Sub-sections 2 and 3. By former sections 227 and 228, such by-laws were subject to approval or disapproval by the Governor in Council, and to subsequent revision after publication in the "Gazette." or may approve in change.

4. No tolls shall be charged by the company until a by-law authorizing the preparation and issue of tariffs of such tolls has been approved by the Board, nor shall the company charge, levy or collect any money for any services as a common carrier, except under the provisions of this Act. 51 V., c. 29, ss. 223, 227, 228 and 231, Am. No tolls to be charged until by-law approved by Board.

Sub-section 4 corresponds to a similar provision in former section 227. Where the tolls had not been approved as required by section 227, a passenger was held not entitled to recover back money paid by him under a mistake of fact, where it was such as in equity and good conscience he ought to have paid.

Lces v. Ottawa & New York R.W. Co. (1900), 31 O.R. 567: see *Scott v. Midland R.W. Co.*, 33 U.C.R. 580, until the by-law fixing the tolls is passed, the defendants had no right to levy any tolls, but were only entitled as common carriers to reasonable compensation.

Discrimination.

252. Such tolls may be either for the whole or for any particular portions of the railway; but all such tolls shall always, under substantially similar circumstances and conditions be Discrimination prohibited.

charged equally to all persons, and at the same rate, whether by weight, mileage or otherwise, in respect of all traffic of the same description and carried in or upon a like kind of cars, passing over the same portion of the line of railway; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular person or company travelling upon or using the railway. 51 V., c. 29, s. 224, Am.

Proportionate decrease in tolls in certain cases.

2. The tolls for larger quantities, greater numbers, or longer distances may be proportionately less than the tolls for smaller quantities or numbers, or shorter distances, if such tolls are, under substantially similar circumstances charged equally to all persons. 51 V., c. 29, s. 225, Am.

Sub-section 1 differs from the former section 224, in (a) substituting "substantially similar circumstances and conditions" for "same circumstances;" (b), omitting "only" from the phrase "only over the same portion of the line of railway." "Traffic" is used as defined in section 2. In other respects, the substance is the same, though the words are somewhat different.

This section is based upon the "equality clause," section 90, of the English Railway Clauses Consolidation Act, 1845, 8 Viet., cap. 20.

"*Substantially similar circumstances and conditions.*" This phrase has been adopted instead of "same conditions" in the English Act, and is employed in the same connection in the corresponding section 2 of the Act to Regulate Commerce, 1887, Chap. 104, 24 U.S. Statutes at Large, 379, I.C. Act, which is as follows:—

"That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives, from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic *under*

substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.”

The same phrase is employed in sub-section 3, and the corresponding section 4, of the Inter-State Commerce Act, but, as will be seen, with a different meaning.

The Inter-State Commerce Act in many of its sections has been copied almost literally from the English Railway and Canal Traffic Act, 1854, and the Regulation of Railways Act, 1873.

The Supreme Court of the United States has repeatedly recognized the rule that where such is the case, the construction of these statutes by the English Courts of Law has been considered as silently incorporated into the Acts, or received with all the weight of authority.

McDonald v. Hovey, 110 U.S. 619.

Texas & Pacific R.W. Co. v. I. C. C., 162 U.S. 197;

I. C. C. v. Alabama Midland R.W. Co., 168 U.S. 144.

But other sections are dissimilar, and the methods of trade and transportation on this continent are different from those prevailing in England. *Trammell v. Clyde S. S. Co.*, 4 I.C. Rep. 121.

“The charge must be the same to all for the same services performed in the same manner, for carrying goods for the same distance, and for similar services rendered in any other way.”

London & N. W. R.W. Co. v. Evershed (1878), 3 App. Cas. 1029, 1036.

What constitutes differences in circumstances and conditions justifying an inequality of charge are those “relating to the carriage of the goods,” to the nature and character of the service rendered by the carrier, and not to the business motives either of the shipper or carrier. It does not refer to who the shipper may be, whether a competitor, or friendly or unfriendly to the interests of the railway company.

Great Western R.W. Co. v. Sutton (1869), L.R. 4 H.L. 226;

Denaby Main Colliery Co. v. Manchester, S. & L. R.W. Co., 11 App. Cas. 97.

Nor because one shipper “can go by another route, and probably will do so, if charged as much as the charge made to the complaining party, a circumstance justifying an unequal charge:”

Evershed's case, supra;

Wight v. United States (1897), 167 U.S. 512.

Nor because the railway company is seeking to develop a new trade or open up new markets; *Denaby Main Co.'s case, supra: Union Pacific R.W. Co. v. Goodridge*, 149 U.S. 680.

Nor that the shipper contracts to give all his shipments to the carrier favoring him; *Baxendale v. Great Western R.W. Co.*, 5 C.B.N.S. 309.

A difference in the cost of service is a proper ground for a difference in the tolls or charges; in other words, it constitutes a real difference in "circumstances and conditions;"

Denaby Main Co.'s Case, supra.

See also *I. C. C. v. B. & O. R.W. Co.*, 145 U.S. 263.

But the differences in charges must not be so disproportionate to the difference in cost as to be unreasonable; *ibid.*

The Inter-State Commerce Commission have held that carriers might properly make a difference in their rates between carloads and less than carload shipments, but such differences must be reasonable, and must not be so wide as to be destructive of competition between large and small dealers.

Thurber v. New York Central & H. R. R.W. Co., 2 I.C. Rep. 742:

On account of the phenomenal differences in expense of service rendered, the exceptionally high rates on oil in barrels less than carload lots, as compared with oil in carload lots was sustained, with a warning against the tendency to make excessive differences in favor of all shipments in carload lots as against shipments of similar articles in less than carload lots.

Scofield v. L. S. & M. S. R.W. Co., 2 I.C. Rep. 67.

Differences between carload and less than carload rates from Chicago, St. Louis, and points in the Middle West to Pacific Coast territory, averaging about 50 cents per 100 pounds, were held not unreasonable, but a greater difference, and at the same time more than 50 per cent. of the carload rate, is *prima facie* excessive.

Business Men's League v. A. T. & S. F. R.W. Co., 9 I.C. Rep. 319.

In the *Tower Oiled Clothing Company's Case*, 3 Can. Ry. Cas. 417, the Board referred to the difference between carload

and less than carload ratings as authorized generally in all the classifications, and operating in favour of the larger and against the smaller shippers; but this, it is said, has never been regarded as unjust discrimination, has become firmly established by custom, and has been tacitly acquiesced in by the different Railway Commissions. While the I. C. Commission have decided that different rates may be charged on carload and less than carload shipments, where the difference is not too great, a still lower rate for shipment of a hundred or a thousand carloads, though duly published and impartially applied, would be wholly indefensible.

Carr v. Northern Pacific R.W. Co. (1901), 9 I.C. Rep. 1.

So also it has been decided that to charge different rates on carload than on cargo or train load shipments of grain, whether carried for export or for domestic use, violates the rule of equality, and tends to defeat its just and wholesome purpose; *Paine v. Lehigh Valley R.W. Co.* (1897), 7 I.C. Rep. 218.

So an offer of discount or rebate of rates based on a 30,000 ton limit is an unreasonable and unlawful limitation, because necessarily resulting in unjust discrimination. It cannot be supported on the consideration of quantity on the analogy usually made in ordinary business transactions between wholesale and retail dealers. *Providence Coal Co. v. Providence & Worcester R.W. Co.*, 1 I.C. Rep. 363.

On the other hand, it is not unjust discrimination to carry at lower rates in consideration of the guarantee of large quantities and full train loads at regular periods, provided the real object be to obtain a greater remunerative profit by the diminished cost of carriage, though the effect may be to exclude from the lower rate the shipper who cannot give such guarantee. *I. C. C. v. Texas & Pacific R.W. Co.*, 52 Fed. Rep. 187: citing *Nicholson v. G. W. R.W. Co.*, 5 C.B.N.S. 366. See also *Dalby v. Midland R.W. Co.*, 10 Ry. & C. Tr. Cas., at p. 312, per Sir Frederick Peel, Commissioner. To justify the larger dealer having a lower rate, it must appear that there is a saving to the railway company in the carriage of his traffic, or something more than a mere quantitative difference to the company more or less equivalent to the advantage they give him.

In the *Thurber Case*, *supra*, the Inter-State Commerce Commission also decided that a difference in rate for a carload of one

kind of freight from one consignor to one consignee, and a carload quantity from the same point of shipment to the same destination, consisting of the same or like freight, from more than one consignor to one consignee, or one consignor to more than one consignee, is not justified by the difference in cost of handling.

In the "*Packed Parcels Case*," *Great Western R.W. Co. v. Sutton*, *supra*, the carrier was held not entitled under the "equality clause" to impose a higher rate on property tendered by an intercepting or forwarding agent than when offered by the owner. In *Lundquist v. Grand Trunk R.W. Co.*, 121 Fed. Rep. 215, it was held that the carrier may distinguish between the forwarding agent and the owner of the property, and may apply the carload rating when the goods are tendered for shipment by the owner, and refuse it when the like traffic is offered by the forwarder. In the latest case before the Inter-State Commerce Commission, *Buckeye Buggy Co. v. C. C. C. & St. L. R.W. Co.* (1903), 9 I.C. Rep. 620, the rule in defendant's classification was modified so as to allow carload rates on carload lots to both consignor and consignee, when the condition of ownership after the property is delivered to the carrier is the same. Whether the carrier may distinguish between the forwarding agent and the actual owner was not decided.

It is not a violation of this sub-section to charge more in one direction on certain trains than is charged in the other direction on all trains between the same points; *Hewins v. N. Y. C. & H. R. R.W. Co.*, 10 I.C. Rep. 221; Following *C. C. C. & St. L. R.W. Co. v. Illinois*, 177 U.S. 514.

A less charge to through passengers between Edinburgh and Glasgow than to passengers on the same train between Motherwell (an intermediate point) and Edinburgh, is not in violation of the equality clause; *Hozier v. Caledonian R.W. Co.*, 1 Nev. & Mac. Ry. Cas. 27, 24 L.T. 339.

The service rendered by a railway company in transporting a local passenger between two points is not identical with the service rendered in transporting a through passenger between the same points as part of the transit over the distance of the whole line; *Union Pacific R.W. Co. v. U. S.*, 117 U.S. 355.

There is no necessary connection or relation between the rates on traffic of the same kind or class transported between the

same points in *opposite directions* over the same line or road, the fact that such rate in one direction is materially higher than that in the opposite direction does not, as in the case of hauls over the same line in the same direction, establish *prima facie* the unreasonableness of the higher rate. This is especially true where the hauls are of great length. *Duncan v. A. T. & S. F. R.W. Co., et al.* (1893), 6 I.C. Rep. 85. See also *Macloon v. B. & M. R.W. Co., et al.*, 9 I.C. Rep. 642. In that case the fare charged to a passenger from Boston, Mass., to Janesville, Wisconsin, was \$2 greater than the fare paid in the opposite direction. Held that this was not unjust discrimination, and did not of itself render the higher fare unreasonable.

Without infringing this sub-section, a "party-rate ticket" may be issued at a rate less than that charged to one individual for like transportation on the same trip; *I. C. C. v. B. & O. R.W. Co.*, 145 U.S. 263.

Granting free passes or reduced rates falls within the prohibition in this sub-section; *Re Boston & Maine R.W. Co.*, 3 I. C. Rep. 717.

3. No toll shall be charged which unjustly discriminates between different localities. The Board shall not approve or allow any toll, which for the like description of goods or for passengers, carried under substantially similar circumstances and conditions in the same direction over the same line, is greater for a shorter than for a longer distance, the shorter being included in the longer distance, unless the Board is satisfied that owing to competition, it is expedient to allow such toll. The Board may declare that any places are competitive points within the meaning of this Act. 51 V., c. 29, s. 232, Am.

Unjust discrimination between localities prohibited.
Long and short haul clause.
Competitive points.

Sub-section 3, corresponds to section 4 of the Inter-State Commerce Act, also known as the "Long and Short Haul Clause," which prohibits a carrier charging greater compensation "for the transportation of passengers, or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance."

The decisions of the Courts and the Railway Commissioners upon the construction of the "undue preference" clause of section 2, of the Railway and Canal Traffic Act, 1854, 17 & 18 Vict., cap. 31 (incorporated in section 253, 1, *q.v.*). have substantially accomplished the object of this section.

"Substantially similar circumstances and conditions." Although this is the same phrase as in sub-section 1 of this section, it has received a different meaning by the Supreme Court of the United States, over-ruling the earlier decisions of the Inter-State Commerce Commission.

In *I. C. Commission v. Alabama Midland R.W. Co.*, 168 U.S. 144, the Supreme Court held that in applying the provisions of sections 3 and 4 (sections 253 (1) and 252 (3), Railway Act, 1903), competition between rival routes which affects rates is one of the matters to be considered, but is not applicable to section 2, (section 252 (1), Railway Act, 1903).

The phrase in section 2, Inter-State Commerce Act, refers to matters of carriage, and does not include competition between rival routes. Different meanings may be given to the same words in different sections of the same Act, for the purposes of the several sections are different. The phrase in section 2 (Inter-State Commerce Act), must be read as restricted to shippers over the same road, leaving no room for the operation of competition; but in the other section, which covers the entire field of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts having a legitimate bearing on the situation, amongst which is the fact of competition, which affects rates. Where the traffic originates, or where the goods are shipped, the welfare of the locality to which the goods are sent is also to enter into the question.

In this case, known as the "Troy Case," proceedings were commenced to compel the carrier to obey an order of the Commission, forbidding the charge of a lesser rate for transportation to Montgomery, the longer distance, than was charged to Troy, on the same line, for the shorter distance.

Another important decision upon section 4, of the Inter-State Commerce Act, corresponding to this sub-section, is *Texas & Pacific Railway Co. v. I. C. C.*, 162 U.S. 197, known as the "Import Rate Case." Certain carriers were charging less on imported goods than on domestic goods or on freight originat-

ing at seaboard points. Not only was there a lower rate for the inland carriage of foreign traffic, but in many cases the total charge from the foreign place of origin (*e.g.*, Liverpool) through United States seaports (*e.g.*, New Orleans) to destination in the interior of the United States (*e.g.* San Francisco), was much less than the rail charge alone on domestic goods of like description from the same seaports to the same destination. The Commission denied the right of the railways to discriminate between domestic and foreign goods, and maintained that the competition of ocean lines, or the movement of foreign commerce before reaching the United States, did not constitute a dissimilarity of circumstances and conditions, within the meaning of the Inter-State Commerce Act, and the section under consideration. The Supreme Court reversed this decision, and held—"That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates or charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue or unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered."

All circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies and of the producers, shippers, and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the Act (*Ibid*).

Competition between rival routes is one of the matters which may lawfully be considered in making rates for inter-state commerce, and substantial dissimilarity of circumstances and conditions may justify common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line in such commerce. The phrase "under substantially similar circumstances and conditions," in the 4th section, includes all the facts that have a legitimate bearing on the situation, among which is the fact of competition, when it affects rates: *I. C. C. v. Alabama Midland R.W. Co.*, *supra*; *I. C. C. v. East Tennessee V. & G. R.W. Co.*, 181 U.S. 1; *I. C. C. v. Clyde S.S. Co.*, 181 U.S. 29; see also *Behlmer v. L. & N. R.W. Co.*, 169 U.S. 644, 175 U.S. 648.

The competition relied upon must not be artificial or merely conjectural, but material and substantial, thereby operating on the question of traffic and rate making, the right in every event to be only enjoyed with a due regard to the interest of the public, after giving full weight to the benefits to be conferred on the place whence the traffic moved, as well as those to be derived by the locality to which it is to be delivered.

When competition which controls rates prevails at a given point, a dissimilarity of circumstances and conditions is created justifying the carrier in charging a lesser rate to such point, it being the longer distance, than it exacts to a shorter distance and non-competitive point on the same line: *I. C. C. v. L. & N. R.W. Co.* (1903), 190 U.S. 273. A near and non-competitive point on the same line is not entitled to lower rates prevailing at a longer distance and competitive place, on the theory that it could also be made a competitive point if designated lines of railway carriers, by combinations among themselves, agreed to that end. The competition necessary to produce dissimilarity of conditions must be real and controlling, and not merely conjectural or possible: *Ibid.*, p. 273.

Where a charge of a lesser rate for a longer than for a shorter haul for the same line is lawful because of the existence of controlling competition at the longer distance place, the mere fact that the less charge is made for the longer distance does not alone suffice to cause the lesser rate for the longer distance to be unduly discriminatory.

Upon a claim of *unjust discrimination* in favour of New York over Boston on west-bound rates, the Inter-State Commerce Commission (at p. 760, 1 I.C. Rep., *Boston Chamber of Commerce v. L. S. & M. S. R.W. Co., et al.*), approve the statement that "different localities may be more or less favoured by nature or human enterprise in regard to transportation facilities, and it is no part of the duty of a common carrier to equalize these at his own expense. He must not himself create them arbitrarily. He must treat all alike that are situated alike, but is not bound to wipe out existing differences. He may be obliged to carry freight at a lower rate to some localities than to others, but this does not in itself constitute an injustice or injury to a shipper in a less favoured locality, so long as the charges are reasonable in themselves, and alike to all in the same situation." Among the

“*circumstances and conditions*” to be considered in such a case are, the length and character of the haul, the cost of service, the value of business, the conditions of competition, the storage capacity, and the geographical situation of the different terminal points: *Ibid.*

If the carrier is acting *bonâ fide* under the compulsion of circumstances and conditions beyond his control (as competition by an independent water route), and to avoid large loss adopts exceptional rates, he is justified in doing so: *Business Men's Association v. C., St. P., & O. R.W. Co.*, 2 I.C. Rep. 41; and numerous other cases cited in *King v. N.Y., N.H., & H. R.W. Co.*, 3 I.C. Rep. 272.

The result of these decisions is tersely summed up by the I. C. Commission in *Dallas Freight Bureau v. A. & N. W. R.W. Co.* (1901), 9 I.C. Rep. 68, thus: “Competition, whether it be water competition, railroad competition, or market competition, provided it produces a substantial and material effect upon traffic and rate-making, may create *dissimilarity of circumstances and conditions*,” and such competition must be taken into account in cases arising upon complaint under the 4th section (I.C. Act).

4. No company shall, except in accordance with the provisions of this Act, directly or indirectly, pool its freights or tolls with the freights or tolls of any other railway company or common carrier, nor divide its earnings or any portion thereof with any other railway company or common carrier, nor enter into any contract, arrangement, agreement, or combination to effect, or which may effect, any such result, without leave therefor having been obtained from the Board. Pooling
pro-
hibited.

Section 252, Sub-section 4. The concluding qualification, “except in accordance with the provisions of this Act,” refers to section 284 (*q, v*).

The corresponding section 5 of the Inter-State Commerce Act provides, “That it shall be unlawful for any common carrier, subject to the provisions of this Act, to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights on different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof.”

Two methods of pooling are intended to be prohibited: First, a physical pool, which means a distribution of freight or passengers by the carrier offered for transportation among different and competing railroads in proportions and on percentages previously agreed upon. Second, a money pool—in the language of the Act, to “divide its earnings or any portion thereof with any other railway company.”

Section 5 of the Inter-State Commerce Act was declaratory of the rule already existing at common law. It was aimed against the freight pools existing in the United States at the time of the passing of the Act. The leading terms of these pools were an agreement to maintain tariffs and divide earnings from traffic between the companies on an agreed basis. Lines competing for through traffic agreed to sustain rates and prevent competition, and penalties were provided for any violation of the agreement: see *Missouri Pacific R.W. Co. v. Texas Pacific R.W. Co.*, 30 Fed. Rep. 2. The leading American case on the general question of stifling competition is *Stanton v. Allen*, 5 Denio 440.

Section 5 of the Inter-State Commerce Act, coupled with the provisions of the Sherman Act (2nd July, 1890), “to protect trade and commerce against unlawful restraints and monopolies,” has been the subject of judicial decision by the United States Supreme Court: *United States v. Trans-Missouri Freight Association*, 166 U.S. 290; *United States v. Joint Traffic Association*, 171 U.S. 505; *Northern Securities Co. v. United States*, 193 U.S. 197.

Railroad pools are not contrary to public policy in England or in Canada. Section 284 of the Railway Act, which is similar in its terms to section 87 of the Railway Clauses Act, 1845, permits working or traffic agreements: see *Hare v. L. & N. W. R.W. Co.*, 2 J. & H. 480. Two companies having the same termini, may, *in order to avoid competition*, come to an agreement with reference to the traffic along existing routes on their lines, with a view to distribute such traffic, and the revenue derived from it, between the two companies. This case was followed in *Great Western R.W. Co. v. Grand Trunk R.W. Co.*, 25 U.C.R. 37, and *Campbell v. Northern R.W. Co.*, 26 Gr. 522.

Neither this sub-section nor section 5 of the Inter-State Commerce Act prohibits division of passengers among *competing*

roads: so decided by Inter-State Commerce Commission in *Re Transportation of Emigrants from New York* (1904), 10 I.C. Rep. 13.

Where "fines" or "penalties" are imposed upon the members of voluntary associations of railway and steamship companies for violation of its rules, which appear available as substitutes for payments which would be exacted under a regular pooling system, such an arrangement is a violation of the statutory prohibition: *Freight Bureau v. C. N. O. & P. R.W. Co.*, 6 I.C. Rep. 195.

A railroad is not prohibited from pooling with a competing pipe line: *Independent Refiners Association v. Western N.Y. & P. R.W. Co.*, 4 I.C. Rep., at p. 176. So also competing express companies may pool their earnings: *Re Express Companies*, 1 I.C. Rep. 677.

253. All companies shall, according to their respective powers, afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding and delivering of traffic upon and from their several railways, for the interchange of traffic between their respective railways, and for the return of rolling stock; and no company shall make or give any undue or unreasonable preference or advantage to, or in favour of, any particular person, or company, or any particular description of traffic, in any respect whatsoever,—nor shall any company, by any unreasonable delay or otherwise, howsoever, make any difference in treatment in the receiving, loading, forwarding, unloading, or delivery of the goods of a similar character in favour of or against any particular person or company, nor subject any particular person, or company, or any particular description of traffic, to any undue, or unreasonable, prejudice or disadvantage, in any respect whatsoever; nor shall any company so distribute or allot its freight cars as to discriminate unjustly against any locality or industry, or against any traffic which may originate on its railway destined to a point on another railway in Canada with which it connects; and every company which has or works a railway forming part of a continuous line of railway with, or

Duty of company to afford reasonable facilities for receiving, forwarding and delivering traffic without partiality and without unreasonable delay
Undue preference or advantage.
Difference in treatment
Undue prejudice or disadvantage.

which intersects, any other railway, or which has any terminus, station or wharf near to any terminus, station or wharf of any other railway, shall afford all due and reasonable facilities for delivering to such other railway, or for receiving from and forwarding by its railway all the traffic arriving by such other railway without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction is offered to the public desirous of using such railways as a continuous line of communication, and so that all reasonable accommodation, by means of the railways of the several companies, is, at all times, afforded to the public in that behalf; and any agreement made between any two or more companies contrary to this section shall be unlawful and null and void. 51 V., c. 29, s. 240, Am., by 61 V., c. 22, s. 1, and 1 Ed. VII., c. 32, Am.

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Section 253, Sub-section 1. This section (formerly section 240, Act of 1888), except the portions in italics, is taken from section 2 of the Railway and Canal Traffic Act, 1854, 17 & 18 Viet., cap. 31. The remaining portions of this section, where new, are borrowed for the most part from section 3 of the Inter-State Commerce Act. Clause 2, which here comes first, is as follows:—

“Every common carrier, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; *but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.*”

Then comes clause 1 of section 3, Inter-State Commerce Act:

“That it shall be unlawful for any common carrier, subject to the provisions of this Act, to make or give any undue or unreasonable preference or advantage to any particular

person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The provisions against unjust discrimination in the distribution of freight cars, or against any of its traffic intended for a connecting railway, also the concluding provision as to agreements contrary to this section being null and void, are new.

"According to their respective powers" does not refer to powers restricted by any private agreements with individuals: *Rishton Local Board v. L. & Y. R.W. Co.* (1893), 8 Ry. & C. Tr. Cas. 74; see also *South Eastern R.W. Co. v. Ry. Commrs. and Corporation of Hastings*, *infra*, at p. 479.

"Facilities." (See section 271 for a statement of what are included.) Under section 2, Railway and Canal Traffic Act, 1854, it has been held that the company may be directed to afford the facilities therein mentioned, even though structural alterations may be required. But there is no power to order any particular works to be carried out. The facilities to be provided must be within the powers of the railway company: *South Eastern R.W. Co. v. Railway Commrs. and Corporation of Hastings*, 6 Q.B.D. 586; *Newington v. N. E. R.W. Co.*, 3 Nev. & Mac. 306. The railway company cannot be ordered to provide accommodation which requires the company to acquire additional land, which it has no immediate power to take: *Harris v. L. & S. W. R.W. Co.*, 3 Nev. & Mac. 331; *Arbroath v. Caledonian and North British R.W. Cos.*, 10 Ry. & C. Tr. Cas. 252.

Under this section the Railway Commissioners have no jurisdiction to order stations to be built where there are none, or to order the company to double its line: *Glamorganshire v. G. W. R.W. Co.*, 8 Ry. & C. Tr. Cas. 196; or to order a station when pulled down to be rebuilt, or to resume traffic on the railway: *Darlaston v. L. & N. W. R.W. Co.* (1894), 2 Q.B. 45 and 494, 8 Ry. & C. Tr. Cas. 216. Under section 214 (4), the Board may order the company to furnish accommodation for passengers and freight at stations and at junctions with other railways, as the Board deems expedient, having regard to all proper interests—

this is an authority which the Commissioners under the English Statute (Ry. & C. Tr. Act, 1888), do not possess. See section 204 (3) as to stations on subsidized lines after 18th July, 1900.

With regard to passenger traffic, facilities will not be ordered to be given on the complaint of an individual for his personal convenience. It is necessary to show a case of general inconvenience, and that the accommodation sought can reasonably be granted: *Bartlett v. Great Northern and Midland R.W. Cos.*, 1 Nev. & Mac. 38; *Jones v. L. B. & S.C. and London & S.W. R.W. Cos.*, 2 Nev. & Mac. 155. This section does not compel the company to find reasonable accommodation for the public further than as it is in the interests of railway traffic that it should be found: *Holyhead Local Board v. L. & N. W. R.W. Co.*, 3 Ry. & C. Tr. Cas. 37.

A cloak-room as a reasonable facility for the receipt and safe custody of baggage, is within this section: *Singer Manufacturing Co. v. L. & S. W. R.W. Co.* (1894), 1 Q.B. 833; also platforms of sufficient length, and waiting-rooms and ticket offices at stations, and accommodation for cattle; but not refreshment-rooms and covering over platforms, *however desirable for the comfort and convenience of passengers*: *South Eastern R.W. Co. v. Railway Commissioners and Corporation of Hastings*, *supra*. To demand payment for the use of water-closets at a station is not a denial of reasonable facilities within the meaning of the section: *West Ham v. Great Eastern R.W. Co.*, 9 Ry. & C. Tr. Cas. 7, 64 L.J.Q.B. 340. The provision as to *reasonable facilities* has no reference to the prices charged by the company for conveyance: *Brown v. Great Western R.W. Co.*, 3 Nev. & Mac. 523. Apart from any facilities granted by the Railway Commissioners, the company has the right to exclude from its stations all persons except those using or desirous of using the railway, and may impose on the rest of the public seeking admission any terms it thinks proper. The jurisdiction to determine whether there is a statutory right to demand from a railway company a facility or privilege belongs exclusively to the Railway Commissioners: *Perth General Station Committee v. Ross* (1897), A.C. 479.

Under the Inter-State Commerce Act, it has been considered that a through bill of lading is a *facility*, but is not a *necessity* for interchange of freight with a connecting line; so held in a proceeding to compel a carrier by mandamus to receive freight

and traffic from and furnish facilities to competing carriers over its line on the same reasonable terms and conditions as were afforded to other carriers: *Augusta Southern R.W. Co. v. Wrightsville R.W. Co.*, 74 Fed. Rep. 522.

One who has built a switch connection with its track, with the consent of the company, has an implied right to service at such switch, and unless such service is limited either expressly or by implication, he may lawfully insist that the carrier shall there receive and deliver all such freight as it customarily carries, and for the receipt and delivery of which the switch is suitable and convenient: *Inter-State Stock Yards Co. v. Indianapolis R.W. Co.*, 99 Fed. Rep. 472.

The facilities between connecting railways only refer to the existing facilities at terminal stations, that is, where such are established, and not where there is merely a physical connection or intersection: *Little Rock, etc., R.W. Co. v. St. Louis, etc., R.W. Co.*, 59 Fed. Rep. 403; *United States v. Delaware R.W. Co.*, 41 Fed. Rep. 101.

There is no jurisdiction in the Inter-State Commerce Commission to order railway companies to provide new stations, yards, depots, or additional tracks, to form new connections, to furnish any particular equipment of cars, or in fact any cars whatever: *Kentucky & Indiana Bridge Co. v. L. & N. R.W. Co.*, 37 Fed. Rep. 567; *Schofield v. L. S. & M. S. R.W. Co.*, 1 I.C. Rep. 67.

The U.S. Supreme Court have held that it is the duty of a railway company to provide suitable facilities for receiving and delivering live stock at its stations without additional compensation other than the regular transportation charge, and the company may provide these facilities by contract with a stock yards company: *Covington Stock Yards Co. v. Keith*, 139 U.S. 128.

The company may provide such terminal facilities for the handling of live stock by making an exclusive contract with a particular stock yards company at destination. It is not required by the Inter-State Commerce Act to deliver car-loads of live stock to a connecting carrier for delivery to other stock yards at the same destination. Section 3, Inter-State Commerce Act, imposes no obligation upon a railroad company having its own stock yards, under a lease from a stock yards company, to accept live stock for delivery at the stock yards of another railroad company in the same city or neighbourhood, although there is a

physical connection between the two roads: *Central Stock Yards Co. v. L. & N. R.W. Co.* (1901), 192 U.S. 568. See also *Railroad Commrs., Kentucky v. L. & N. R.W. Co.* (1904), 10 I. C. Rep. 173.

There is an express provision in section 3, sub-section 2, of the Inter-State Commerce Act, against any carrier being required to give the use of its tracks, etc., to any other. There is nothing in the Inter-State Commerce Act corresponding to the concluding portion of section 253, sub-section 1, and section 271, taken from the English Acts of 1854 and 1888, obliging facilities to be afforded for through traffic, to the provisions for through rates in section 25 of the English Act of 1888, or for joint tariffs in sections 266 and 267 of this Act. The result is that the Inter-State Commerce Commission has no authority to establish through routes nor fix through rates between connecting lines. Neither a shipper nor a connecting carrier under the Inter-State Commerce Act can require the company to ship by a particular route beyond the company's line. Arrangements in respect of through freight, joint through rates, through tickets, forms of bills of lading, and the apportionment of such rates, are all matters of private arrangement in the United States, as such matters usually include the exchange of cars and the use of each other's tracks and terminal facilities: *Kentucky & Indiana Bridge Co. v. L. & N. R.W. Co.*, 37 Fed. Rep. 567.

Special provision is made in the Railway Act for one company procuring "facilities" from another. By section 177 the railway lines or tracks of any company may be joined with those of any other company, with the leave of the Board. By section 137 one company may, with the approval of the Board, obtain a right of way over the lands of another company, or the use of its tracks, stations, and station grounds. By section 176 the owner of an industry may procure the construction of a branch line from the railway to such industry, and the company may be ordered by the Board to construct, maintain, and operate such branch line, upon the owner making a deposit of the probable cost thereof.

Some difference of opinion has been expressed as to whether a railway company is bound under sec. 2 of the Railway and Canal Traffic Act, 1854, to afford facilities by means of a siding connection. If the siding connection is legally in existence, the *con-*

tinuance of such connection may be a "reasonable facility" within the meaning of the Act, and what facilities the company should furnish for the receipt and delivery of traffic at such a siding is a question for the Commissioners to determine under that section: *Flinn v. Midland R.W. Co.*; *Beeston v. Midland R.W. Co.*, 5 Ry. & C. Tr. Cas. 53, 60.

In *Cowan & Sons v. North British R.W. Co.* (No. 2), 11 Ry. & C. Tr. Cas. 96, it was held that the Railway Commission had no power under section 2 of the Railway and Canal Traffic Act, 1854, to order a railway company to deliver traffic at a private siding, such sidings not being part of the railway.

Section 214 (4) contains a new provision that the Board may order the company to furnish *adequate and suitable accommodation* for receiving and loading traffic at stations and junctions with other railways. It may be contended that such "accommodation" can only be required to be furnished "according to its powers:" sub-sec. (1)—i.e., with the existing facilities for handling traffic.

Undue Preference or Advantage—Undue Prejudice or Disadvantage. This section implies that there may be a preference, it does not make every inequality of charge an undue preference. If the circumstances so differ that the difference in charge is in exact conformity to the difference in circumstances, there would be no preference at all: *Phipps v. L. & N. W. R.W. Co.*, 8 Ry. & C. Tr. Cas. 83, *per* Lord Herschell, at p. 95; (1892), 2 Q.B. 229. See also *Texas & Pacific R.W. Co. v. I.C.C.*, 162 U.S. at 219.

The benefit of geographical position ought to be taken into account in rates from different places to the same centre: *Newry v. Great Northern R.W. Co.*, 7 Ry. & C. Tr. Cas. 184; *Abram v. Great Central R.W. Co.*, 21 T.L.R. 264.

It has never been considered an infringement of section 2 of the Act of 1854, (upon which section 253 is based), that a company should charge a higher rate per ton per mile for any portion of its line over which it is more expensive to work than other portions, *ibid.*, *per* Sir Frederick Peel, at p. 199. *Newry v. Great Northern R.W. Co.*, *supra*.

It is no part of the duty of the Commission to equalize differences in the actual advantages of localities through the adjustment of tariffs or rates. *Re Transportation of Salt from Michigan to Missouri River points*, 10 I.C. Rep. 148.

The I. C. Commission have held under section 3, I. C. Act (containing the same provisions as section 253), that it has jurisdiction to deal with a case of alleged undue prejudice and disadvantage to shippers of outward package freight through the enforcement by carriers of a regulation providing for the closing of depots used for the reception of such freight earlier than at other competing distributing cities: *Cincinnati v. B. & C. S. W. R.W. Co.* (1904), 10 I.C. Rep. 378.

When a carrier makes rates to two competing markets which give one a practical monopoly over the other because it can secure reshipments from the favoured locality and none from the other, it goes beyond serving its fair interest, and violates the statutory requirement, (section 3, I. C. Act), of relative equality as between persons, localities, and particular descriptions of traffic. *Savannah v. L. & N. R.W. Co., et al.*, 8 I.C. Rep. 377.

As there may be competing localities, so there may be competing commodities, "a particular description of traffic."

It has been held that the section prohibits discrimination between differently described articles which are competitive in the same market, e.g., live hogs, cattle, and the dressed products of each, are found to be competitive commodities, and are therefore entitled to relatively reasonable rates for transportation, proportioned to each other according to the respective costs of service: *Squire v. Michigan Central, etc., R.W. Co.*, 3 I.C. Rep. 515.

In *Board of Trade of Chicago v. Chicago & Alton R.W. Co. et al.*, 3 I.C. Rep. 233, an unlawful discrimination was found to exist between the live hog and its products in favour of other markets and buyers, and against Chicago and its buyers and packers. So also in *Chicago Live Stock Exchange v. Chicago Great Western R.W. Co. et al.*, 10 I.C. Rep. 428, where the charging of higher rates for transporting hogs and cattle, than for transporting live stock products to Chicago from points west, south-west and north-west, was held to be unlawful discrimination, and to give to the traffic in the products of cattle and hogs the shipper and localities interested in such traffic undue and unreasonable preference and advantage.

In *National Hay Assocn. v. L. S. & M. S. R.W. Co., et al.*, 9 I.C. Rep. 264, an advance in rates on hay and straw, without

any corresponding increase in the rates on other commodities, was held to be unjust discrimination against the localities where those commodities are produced and against producers, shippers, dealers, and consumers of such articles in that section of the country.

For further discussion, see the notes and cases cited under section 255, Classification, and section 257, Tariffs.

Unlawful Discrimination Between Carriers in Interchange of Traffic.

A carrier may agree to prepay freight received by it from one connecting carrier, and refuse to do so for another competing connecting carrier. *Little Rock, etc., R.W. Co. v. St. Louis, etc., R.W. Co.*, 59 Fed. Rep. 400; *Oregon Short Line v. Northern Pacific R.W. Co.*, 61 Fed. Rep. 158; *Gulf Railroad v. Miami S. S. Co.*, 86 Fed. Rep. 407. And it is not an unlawful discrimination for a carrier to receive the freight of another connecting carrier without exacting freight charges in advance, *ibid.*

A railway company cannot be ordered to give credit to a customer, and if a customer to whom credit is allowed retains a balance due as a set-off against a balance in dispute on another account, the company are justified in refusing a further ledger account without contravening section 2, Ry. & C. Tr. Act, 1854, though granting such accommodation to other customers: *Skinningrove v. N. E. R.W. Co.*, 5 Ry. & C. Tr. Cas. 244.

Unjust Discrimination in Distributing Freight Cars.

Where a shipper ordered cars for a certain date, the company's action in filling subsequent orders of others before the plaintiff's, was held *unlawful discrimination*: Supreme Court, Utah (1902), 66 Pac. Rep. 768. See also *Hawkins v. L. S. & M. S. and W. & L. E. R.W. Cos.*, 9 I.C. Rep. 207 & 212.

Riddle v. Pittsburg & L. E. R.W. Co., 1 I.C. Rep. 688.

In *Paxton Tie Co. v. Detroit Southern R.W. Co.*, 10 I. C. Rep. 422, the defendant refused to furnish the complainant with cars for shipment of cross ties, while furnishing cars to other shippers for shipment of other freight, and supplied cars for shipment of cross ties almost entirely for its own use, held to be unjust discrimination and *reparation* ordered.

Where a customer has outstanding demurrage accounts against him or uses waggons, (cars), in a way unprofitable to the company, he has hardly a right to complain if the company are somewhat chary in continuing to find him waggons. *Skinningrove v. N. E. R.W. Co.*, 5 Ry. & C. Tr. Cas., at p. 252.

Reasonable Facilities Where Stations are "Near" Another Railway.

By section 1, Ry. & C. Tr. Act, 1888, one station is deemed to be "near" another when they are not more than a mile apart, (if not "within five miles of St. Paul's Church, London"). In the case of such stations at A, where the lines were connected by a line of railway belonging to one of the companies, upon a complaint that no passengers were conveyed on the railway between the two stations, although there was a continuous line of railway, the Railway Commission made an order enjoining both companies to afford at A all due and reasonable facilities for receiving and forwarding by the railway of one company all the passenger traffic arriving by the other company, without any unreasonable delay, etc., in terms of section 2, Ry. & C. Tr. Act, 1888, and under section 14 of same Act, (not in present Act), ordered a scheme to be submitted for its approval for carrying such order into effect. *Maidstone v. S. E. & L., C. & D. R.W. Cos.*, 7 Ry. & C. Tr. Cas. 99.

In another similar case, where the connecting line was used for "goods," (freight), traffic only, the number of persons to be accommodated was shewn to be very small, while the through traffic on both lines was very important, the Railway Commission held that an order for reasonable facilities, but without specifying what they were, must issue, that no case of public necessity had been made out requiring a through service of carriages or trains, intimating that if the two companies complied with the order by making a good covered footpath and providing portorage facilities for passengers with luggage, and established through booking (tickets), it would suffice for the necessities of the existing traffic. *Sussex v. L., B. & S. C. and L. & S. W. R.W. Cos.*, 8 Ry. & C. Tr. Cas. 17.

Anyone of the public intending to send traffic over the railways of two or more companies forming a continuous route may, under section 25 Ry. & C. Tr. Act, 1888, require the com-

panies to continue to carry his traffic at a single booking, (by through billing), and for single payment. *Didcot v. G. W. & L. & N. W. R.W. Co.*, 9 Ry. & C. Tr. Cas. 210.

2. The Board may determine, as questions of fact, whether or not traffic is or has been carried under substantially similar circumstances and conditions, and whether there has, in any case, been unjust discrimination, or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this Act, or whether in any case the company has, or has not, complied with the provisions of this and the last preceding section; and may by regulation declare what shall constitute substantially similar circumstances and conditions, or unjust or unreasonable preferences, advantages, prejudices, or disadvantages within the meaning of this Act, or what shall constitute compliance or non-compliance with the provisions of this and the last preceding section.

This principle has been frequently enunciated by the highest Courts in both England and the United States, "Whether in particular instances there has been an undue or unreasonable prejudice is a question of fact." *Phipps v. L. & N. W. R.W. Co.* (1892), 2 Q.B., per Lord Herschell, at p. 237.

"The argument from authority seems to me to be without conclusive force in guiding the exercise of this jurisdiction; the question whether undue prejudice has been caused being a question of fact depending on the matters proved in each case." *Palmer v. L. & S. W. R.W. Co.*, L.R. 1 C.P. 593, per Erle, C.J.

"They gave a decided, distinct, and great advantage, as it appears to me, to the distant collieries. That may be due or undue, reasonable or unreasonable; but under the circumstances is not the reasonableness a question of fact? Is not it a question of fact and not of law whether such a preference is due or undue? Unless you can point to some other law which defines what shall be held to be reasonable or unreasonable, it must be and is a mere question, not of "law, but of fact." Per Lord Herschell, in *Denaby Main Colliery Co. v. M., S. & L. R.W. Co.*, 3 Ry. & C. Tr. Cas. 426.

So also the Supreme Court, U. S., in *Texas & Pacific R.W. Co. v. I. C. C.*, 162 U.S. at 220.

In *Danville v. Southern R.W. Co.*, 8 I.C. Rep. 409, a case under section 4, I. C. Act, the Commission said, at p. 429:—
 “From the very nature of the question, however, one case can seldom be an exact precedent for another. Each traffic situation presents points of difference, and each complaint must be considered and decided upon its own peculiar facts.” The decisions of the I.C. Commission since 1887, numbered in 1902 some 1290, some of which cover two or more cases decided at the same time. The facts presented in this long series of cases are kaleidoscopic. A single fact may appear a hundred times, but always with a set of different facts. The same group of facts seldom, if ever, appear again in exactly the same combination or relationship. Hence each group of facts embraced in a case, and each decision thereon, is often little more than a decision upon the facts in that particular case. Speaking generally, it has been found that no two cases are alike in every respect, and no rule can be devised by which a decision can be rendered in every case. Nevertheless, as will be seen, there are in many of the cases cited certain common elements and underlying principles.

Burden
of proof
respecting
unjust
discrimi-
nation,
etc.

254. Whenever it is shewn that any company charges one person, company, or class of persons, or the persons in any district, lower tolls for the same or similar goods, or lower tolls for the same or similar services, than they charge to other persons, companies, or class of persons, or to the persons in another district, or makes any difference in treatment in respect of such companies or persons, the burden of proving that such lower toll, or difference in treatment, does not amount to an undue preference or an unjust discrimination shall lie on the company.

What
Board
may con-
sider in
deter-
mining
unjust
discrimi-
nation,
etc.

2. In deciding whether a lower toll, or difference in treatment, does or does not amount to any undue preference or an unjust discrimination, the Board may consider whether such lower toll, or difference in treatment, is necessary for the purpose of securing, in the interests of the public, the traffic in respect of which it is made, and whether such object cannot be attained without unduly reducing the higher tolls.

3. In any case in which the toll charged by the company ^{Apportionment} for carriage, partly by rail and partly by water, is expressed of toll for in a single sum, the Board, for the purpose of determining carriage by land whether a toll charged is discriminatory or contrary in any and water way to the provisions of this Act, may require the company to declare forthwith to the Board, or may determine, what portion of such single sum is charged in respect of the carriage by rail. 61 V., c. 22, s. 2, Am.

The first sub-section follows section 27, sub-section 1, Railway & Canal Traffic Act, 1888, with only slight changes, "person" and "persons" for "trader" and "traders," (adding "Company"); also "goods" for "merchandise"; omitting "rates or charges" after "tolls" where it occurs.

The second sub-section is also taken from section 27, sub-section 2, of the same Act, the omissions being in italics, and the changes indicated in brackets, as follows:—

Section 27, (2).—"In deciding whether a lower charge, (toll), or difference in treatment does or does not amount to an (any) undue preference, *the Court or the Commissioners (Board), as the case may be, may, so far as they think reasonable in addition to any other considerations affecting the case, take into consideration (consider) whether such lower charge (toll) or difference in treatment is necessary for securing in the interests of the public the traffic in respect of which it is made, and whether (such object cannot be attained) the inequality cannot be removed without unduly reducing the (higher tolls) rates to the complainant. Provided that no railway company shall make, nor shall the Court or the Commissioners sanction, any difference in the tolls, rates or charges made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services.*"

The public referred to in this section is the public of the locality or district affected. Any considerable proportion of the public in general as opposed to an individual or association of individuals will satisfy the description. *Liverpool Corn Traders' Association v. Great Western R.W. Co.*, 8 Ry. & C. Tr. Cas. 114 (1891), 1 Q.B. 120.

The effect of the section is not to limit the Court to the consideration whether or not the lower charge is necessary in the

interests of the public. *Liverpool Corn Traders' Association v. London & N. W. R.W. Co.*, 7 Ry. & C. Tr. Cas. 125.

The legitimate desire of the railway company to secure the traffic is not only to be considered, but also whether it is in the interests of the public that they should secure it or abandon it or not attempt to secure it. One class of cases intended to be covered is where traffic from a distance is charged low rates because unless such low rates are charged it will not come into the market at all; per Lord Herschell, in *Phipps v. London & N. W. R.W. Co.* (1892), 2 Q.B., at p. 244, 8 Ry. & C. Tr. Cas. at p. 102.

The fact that a trader has access to a competing route for the carriage of his goods may be taken into consideration by the Commissioners in deciding whether lower tolls or rates charged to such trader constitute an undue preference, *ibid.*

See also *Fairweather v. Corporation of York*, 11 Ry. & C. Tr. Cas. 201, where after taking the public interest and other matters into consideration an agreement with the corporation providing for a fixed charge to Messrs. L. for use of River Ouse navigation in conveying wheat was held an undue preference over another firm also using the river.

A special agreement to grant rebates from 1 to 1 1-4 per cent. in consideration of the annual tonnage carried exceeding 25,000 tons was held an undue preference under section 2. (Act of 1854), and section 27 (Act of 1888), except to the extent of 1-4 per cent. *Charrington v. Midland R.W. Co.*, 11 Ry. & C. Tr. Cas. 222.

In another case, *Daldy v. Midland R.W. Co.*, 10 Ry. & C. Tr. Cas. 303, a similar rebate was reduced from 3d. to 1d. per ton.

An agreement to issue season tickets to traders giving traffic yielding annually £250 or over, at a cheaper rate than to ordinary passengers has been held upon the facts not to be an undue preference. *Inverness Chamber of Commerce v. Highland R.W. Co.*, 11 Ry. & C. Tr. Cas. 218.

Freight Classification.

Freight classification to be adopted which Board may prescribe. Uniformity.

255. The tariffs of tolls for freight traffic shall be subject to and governed by that classification which the Board may prescribe or authorize. The Board shall endeavour to have such classification uniform throughout Canada, as far as may be, having due regard to all proper interests.

2. The Board may make any special regulations, terms and conditions in connection with such classification and as to the carriage of any particular commodity or commodities mentioned therein, as to it may seem expedient. Terms and conditions in classification, etc.

3. The company may, from time to time, with the approval of the Board, and shall, when so directed by the Board, place any goods specified by the Board in any stated class, or remove them from any one class to any other higher or lower class; but no goods shall be removed from a lower to a higher class until such notice as the Board determines has been given in *The Canada Gazette*. Change of class.

This is one of the most important new sections in the Act. Sections 255-275 are substantially all new, and have practically nothing corresponding to them in the former Act of 1888.

General Explanation. Classification, it has been said, is the foundation of all rate-making. It was very early found in the history of railroads that the charges for transportation of different articles of freight could not be apportioned among such articles by reference to the cost of transporting them severally, for if this were attempted, it would restrict within very narrow limits the *commerce* in articles whose bulk and weight was large as compared with their value; so the carriage of very large articles to any distance would be prevented, while the rates on the carriage of very small articles, perhaps of great value, would be absurdly low. Accordingly, it was considered not unjust to apportion the whole cost of service among all the articles transported, upon a basis that should have regard to the relative value of the service, rather than the relative cost of transportation. Such a system of rate-making thus in principle approximates to taxation, the value of the article carried being the most important element to be considered in determining what should be paid upon it.

Accordingly, for convenience and certainty in imposing charges, freight is classified, an article which is placed in one class being charged a higher or lower proportionate rate than that which is placed in another.

But value is not the only thing to be considered when classification is made. Some articles are perishable, some easily

broken, some involve special risks in carriage, some are bulky, some specially difficult to handle, etc. All these considerations affect rates; and in addition, every section of the country has peculiar products it wishes to send to market as widely as possible, and expects the railway to encourage its productions by giving low classification, and thus low rates.

1st Annual Rept. I.C. Com. (1887), pp. 30-1.

The *method of classification* consists in grouping a large number of articles into several different classes, with different rates for the transportation of each class. Articles of the same kind are usually grouped together in the same class as far as possible, but as the articles in each class are very numerous, there is a great diversity among them, and there are generally but few things of the same kind that can be placed in one class. This is unavoidable, because the articles are so numerous, while the classes are but few. All articles embraced in a class are usually charged the rate of that class, whatever it may be. The method of making rates by classification is intended for the convenience of the company and also for the accommodation of the shippers, experience has shewn that it is the best and most practical way of dealing with the subject, but, it sometimes happens that there are inequalities of rates on some of the articles grouped together in one class as compared with others in that class. Where one article of freight in a class is charged a much higher or lower relative rate than it ought to be charged with, compared with another in the same or some other class, this may amount to an unjust discrimination.

In grouping articles together in a class for the purpose of fixing rates, several considerations are usually deemed to have a controlling effect. Among these may be mentioned the competitive element, or rates made necessary by competition, bulk and weight, value, hazardous and extra hazardous freight, liability to waste or injury in transit, the facilities required for particular or special shipments; the volume of the business, that is the tonnage movement, the direction in which the freight moves. Freight occupying a great deal of space must to some extent be charged for that space; or if it be freight of very great value, a higher rate may be charged than if it be of very little value, on account of the responsibility connected with the service, and the corresponding benefit to the owner. *Pyle v. East Tennessee V. & G. R.W. Co.*, 1 I.C. Rep. 767.

17th Annl. Rept. I. C. Com. (1903), p. 116.

The reports of the Inter-State Commerce Commission since its inception in 1887 show persistent efforts, by appeals to the carriers and Congress, for the establishment of a classification uniform throughout the United States. The effort so far has failed, although much has been accomplished. At present there are three principal classifications in force, the Official, Western, and Southern.

The Official classification generally speaking is adopted by the railways in all that portion of the United States lying east of the Mississippi River, Chicago, and Lake Michigan, and north of the Ohio and Potomac Rivers. The Southern obtains in that part of the United States lying east of the Mississippi, and south of the Ohio and Potomac Rivers. The Western Classification governs in the territory west of Lake Michigan and a line drawn from Chicago to St. Louis, and all the territory west of the Mississippi River.

There are, however, many exceptions to the application of these general classifications in the territories above described, *e.g.*, commodity tariffs providing lower rates than the regular classification tariffs for certain staple articles such as grain, lumber, coal, iron, oil, etc., are published by nearly all the leading companies. For some purpose these territories overlap, and freight shipped over different railways may be and often is subject to different classifications.

The Official classification contains nominally six classes, the Western ten, and the Southern twelve. These numbers are somewhat misleading, for there are actually more classes by sub-division than those in each system. From 5,000 to 7,000 items are embraced in these different classifications, due largely to repetitions, *e.g.*, acids occur five times in as many different classes, depending on the method of shipment, there are classifications for articles in carloads, (C.L.), and less than carload lots. (L.C.L.). Some of these classifications are referred to in the *Tower Oiled Clothing Company's Case*, 3 Can. Ry. Cas. 417.

As might readily be expected, charges of unjust discrimination between rival communities or kindred kinds of traffic are found upon investigation to arise from the diverse classifications to which the same commodity is subjected in different

sections of the country, and the manner in which different articles, which are in reality competitive, have been classified, *e. g.*, live-stock and its products, *supra*, p. 510; wheat and flour, *Kauffman v. Missouri Pacific R.W. Co. et al.*, 3 I.C. Rep. 400; corn and corn products, *Bates v. Pennsylvania R.W. Co.*, 3 I.C. Rep. 296; raisins and dried fruits, *Martin v. Southern Pacific R.W. Co. et al.*, 2 I.C. Rep. 1. Raising soap in carloads from 6th to 5th class was held not unlawful; while raising soap in less than carloads from 4th to 3rd class was held unreasonable and unjust. *Proctor & Gamble v. C., H. & D. R.W. Co. et al.*, 9 I.C. Rep. 440. So also raising hay and straw from 6th to 5th class was held to be unjust and unreasonable, and resulting in unlawful discrimination against localities where hay and straw are produced, and against producers, shippers, dealers, and consumers of such articles in that section of the country. *National Hay Association v. L. S. & M. S. R.W. Co. et al.*, 9 I.C. Rep. 264.

The last case cited, that of the *National Hay Association*, *supra*, contains an elaborate discussion of the principles of classification and an analysis of the relevant considerations, such as cost of carriage, revenue to carrier, profit to shipper, etc.

Another principle governing rates for great staples is thus stated in *National Hay Association Case*, at p. 306: "In the carriage of great staples, which supply enormous business, and which in market value and actual cost of transportation are among the cheapest articles of commerce, rates yielding only moderate profit to the carriers are both necessary and justifiable." And it was held that though the carriers may be at some greater expense to handle and transport hay than some other articles in the 5th or 6th class of the Official classification, the character, value, volume, and use of that commodity are such as to require *relatively* low rates for its carriage, *ibid.*

Where different rates were charged for the carriage of different descriptions of coal, splint coal and cannel coal, which the Commissioners found as a fact were competitive and commercially and substantially of the same description for the purpose for which they were used, and the cost of conveyance to the company was the same, held that their carriage at unequal rates was an undue prejudice to the complainants: *Nitshill Coal Co. v. Caledonian R.W. Co.*, 2 Ry. & C. Tr. Cas. 39.

The governing principle of freight classification is to so classify traffic and fix charges thereon, that the burdens of transportation shall be reasonably and justly distributed among the articles carried. This arises from the statutory obligation imposed on carriers not to charge unjust or unreasonable rates, (section 257), or to impose any undue or unreasonable prejudice or disadvantage in any respect whatsoever, (section 253). *National Hay Association v. L. S. & M. S. R.W. Co. et al., supra*, at p. 304.

A freight classification contains but a few general classes. It is impossible to place in each class only such articles as resemble each other in character, use, value, volume, bulk, weight, risk, expense of handling, and competition. The best that can be done is to place in the same class articles generally similar with commodities most nearly related to it in general character and other essential respects, *ibid.*, at p. 307.

An exact classification is impossible. Unless the number of classes is indefinitely increased there must always be articles in respect to which it will be very difficult to determine into which of two classes they should fall. If the elements which fix the class are substantially the same in case of two articles, then those articles should, *as a matter of law*, be classified alike, and to put one in one class and another in another, would be a *discrimination* and a violation of the Act, no matter what the purpose of doing it might be. *Rca v. Mobile & Ohio R.W. Co.*, 7 I.C. Rep., at p. 51.

In determining what freight rate or toll should be borne by different articles or commodities, an attempt should be made to maintain a fair relation between them, and a classification which ignores such considerations is unjust and unreasonable: *e.g.*, placing hatters' furs, scraps and cuttings in double first, but hats only in first class, *Meyer v. C. C. C. & St. L. R.W. Co.*, 9 I.C. Rep. 78.

In the report of the Board of Trade to Parliament (1890), under sec. 24 of the Railway & Canal Traffic Act, 1888, the following important principles are stated to have guided the Board in the classification of merchandise and schedules of maximum rates applicable thereto: "Value, (including damageability), weight in proportion to bulk, facility for loading, mass of consignments, and necessity for handling;" but it was not found

possible to state the proportionate value to be attached to each. Boyle & Waghorn, "Railway & Canal Traffic" (1901), vol. 2, p. 139.

Railway officials who have made a classification cannot testify to their understanding of its construction. It is for the general information of the public, and should be expressed in plain terms, so that an ordinary business man can understand it, and with the table of rates determine for himself the charge for transportation of a given article. Terms of art or terms peculiar to any business may be explained by those engaged in such business, but not by railroad experts in the sense understood by them. *Hurlburt v. L. S. & M. S. R.W. Co.*, 2 I.C. Rep. 81.

Classification of railroad ties in a different class from other lumber is an unjust discrimination. *Reynolds v. Western, N. Y. & Pembroke R.W. Co.*, 1 I.C. Rep. 600; *Scobell v. Kingston & Pembroke R.W. Co.*, 3 Can. Ry. Cas. 412. Common carriers in making rates cannot arrange them from an exclusive regard to their own interests, but must have respect to the interest of those who employ their services and must subordinate their own interests to the rules of relative equality and justice, *ibid.*

In a classification, the market value of articles of commerce and the shipper's representation to the public as to their character, may properly be taken into consideration in ascertaining the analogy they bear to other articles and determining the class to which they justly belong, especially as to articles in which there is no free competition. Carriers are not required to estimate the intrinsic value of freight as distinguished from its commercial value for purposes of classification and rates. So held in *Warner v. New York Central & Hudson River R.W. Co. et al.*, 3 I.C. Rep. 74, where a higher classification for patent medicines than for ale, beer, and mineral water was held not unjust. So also in the case of toilet soap as compared with laundry soap, *Andrews v. Pacific Central & St. Louis R.W. Co. et al.*, 3 I.C. Rep. 77.

Present
freight
classifica-
tion.

4. Until the Board otherwise orders or directs, the freight classification last approved by the Governor in Council before the passing of this Act, shall continue in force, and any freight

classification in use in the United States may, subject to such order or direction, be used by the company with respect to traffic to and from the United States. 51 V., c. 29, s. 226, Am.

The Canadian Freight Classification No. 12, was approved by the Board on July 16th, 1904 (See *Canada Gazette*, 30th July, 1904, p. 195), and is the only one now in force throughout Canada on Dominion railways. It contains ten classes besides subdivisions.

The Official Classification, (U. S.), which contains nominally six classes, usually governs through rates between points in Eastern Canada and points in the United States, within what is generally termed Official Classification Territory, (Eastern Trunk Lines and Central Freight Association); and similarly the use of the Western Classification, (U. S.), which contains nominally ten classes, is sometimes applied to through rates between points in the North-western States and Western Canada. The Southern Classification, (U. S.), is not applicable in Canada nor between any portion of Canada and the United States.

Tariffs.

256. All tariff by-laws and tariffs of tolls shall be in such ^{Form.} form, size and style, and give such information, particulars ^{etc.. of} and details, as the Board may, by regulation, or in any case, ^{tariffs.} prescribe.

257. The Board may disallow any tariff or any portion ^{Disallow-} thereof which it considers to be unjust or unreasonable, or ^{ance.-etc.,} contrary to any of the provisions of this Act, and may require ^{of tariffs.} the company, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tolls in lieu of the tolls so disallowed, and may designate the date at which any tariff shall come into force.

2. Any tariff in force (except standard tariffs, hereinafter ^{Amending} mentioned) may, subject to disallowance or change by the ^{tariffs.} Board, be amended or supplemented by the company, by tariffs, in accordance with the provisions of this Act.

Consolidation
and
reissue.

3. Where any tariff has been amended or supplemented from time to time, the Board may order that a consolidation and re-issue of such tariff be made by the company.

This is a new section. The following cases have been decided by the Board under the first sub-section, reported in 3 Can. Ry. Cas.:

Rates on bottles (C.L.), were reduced on account of foreign competition, *Sydenham Glass Case*, p. 409. Rates on cooperage stock were reduced to rates on common lumber, *Cooperage Stock Case*, p. 421. An increase from 3 to 4 cents per 100 lbs. on logs, on condition that the finished product should be carried over the same railway, was held not unreasonable, the ordinary mileage tariff rate being 7 1-2 cents per 100 lbs, *United Factories Case*, p. 424. The arbitrary rate on coal to Almonte, 40 and 65 cents per ton higher than to Carleton Junction and Ottawa, was reduced to 20 cents, the same as on 10th class freight, *Almonte Knitting Co.'s Case*, p. 441.

The power given to the Board under this section was not given to the Inter-State Commerce Commission. The 1st section of the Inter-State Commerce Act provides that all charges for services rendered, etc., in transportation of passengers or property shall be "reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful:" but the Commission has no power to fix rates, *I. C. C. v. Cincinnati, N. O., & T. P. R.W. Co.*, 167 U.S. 506. The principle upon which rates are considered reasonable and just is thus stated: "Rates should bear a fair and reasonable relation to the average cost of the traffic as delivered to the carrier for transportation, and the average market price the freight will command, or as it is termed, the commercial value of the property." If a rate is so high as to yield a large profit to the carrier and to deprive its patrons of any profit and make their business ruinous, then the interest of its patrons, and the general public interest as well, require the carrier to remit a portion of its profits and accept a rate more equitable both to carrier and public. This is indispensable to make a rate reasonable and just. *Board of Railway Commissioners v. Florence R.W. Co.*, 8 I.C. Rep., at p. 18.

Neither the presence nor absence of competition by carriers, measured solely by their financial interests alone can be relied

on to adjust rates just and reasonable to all: *Tifton v. L & N. R.W. Co. et al.*, 9 I.C. Rep. 178. The legitimate interests of the carriers, traders, shippers and of the localities where the goods are shipped and delivered, should all be considered: *Texas & Pacific R.W. Co. v. I. C. C.* 162 U.S. 197.

Whether an advance in rates should be made depends upon (1), Whether it is *reasonable*, having regard to cost and value of service; and as compared with rates on other commodities (2), whether it is reasonable in the absolute, regarded as a tax upon the people who ultimately pay the transportation charge: *Re Proposed Advance in Freight Rates*, 9 I.C. Rep. 382.

The question whether rates are just and reasonable in themselves is in some measure relative, and may be tested for particular rates with those accepted elsewhere for similar services, *I. C. C. v. East Tennessee R.W. Co.*, 85 Fed. Rep. 107.

A rate can seldom be considered "in and of itself." It must be taken almost invariably in relation to and in connection with other rates. The freight rates, both upon different commodities and between different localities, are largely interdependent, and it is because they do not bear a proper relation to one another, rather than that they are absolutely either too high or too low, which most often gives ground for complaint, *Tileston v. Northern Pacific R.W. Co.*, 8 I.C. Rep. 346.

Through rates are not required to be made on a mileage basis nor local rates to correspond with the divisions of a joint through rate over the same line. Mileage is usually an element of importance, and due regard to distance proportions should be observed in connection with the other considerations that are material in fixing transportation charges. *McMorran v. Grand Trunk R.W. Co.*, 2 I.C. Rep. 604.

When the reasonableness of rates is in question, the charges made on long through lines cannot form a just basis for comparison with local rates for relatively short distances. *Crews v. Richmond & D. R.W. Co.*, 1 I.C. Rep. 703.

258. In all cases a fraction of a mile in the distance over which traffic is carried on the railway shall be considered as a ^{Fraction} ^{of a mile} ^{considered} whole mile. In estimating the weight of any goods in any one single shipment on which the toll amounts to more than ^{Fractions} the minimum, or "smalls" toll, any fraction of five pounds of five

pounds in weight. shall be waived by the company, and five or any fraction above five and up to ten pounds shall be deemed ten pounds by the company; and in estimating the tolls to be charged in passenger tariffs, any fraction of five cents less than two and a half cents shall be waived by the company, and above two and a half cents and up to five cents shall be considered as five cents by the company. 51 V., c. 29, s. 229, Am.

Fractions of five cents.

Sub-division of freight tariffs. **259.** The tariffs of tolls which the company shall be authorized to issue under this Act for the carriage of goods between points on the railway shall be divided into three classes, namely:—

Standard. The maximum mileage tariff, herein referred to as the Standard Freight Tariff;

Special. The reduced class or commodity tariffs, herein referred to as the Special Freight Tariffs;

Competitive. And Competitive Tariffs.

Commodity or Special Freight Tariffs have reference to schedules applicable to such articles as grain, lumber, coal, live stock, dressed beef, fertilizers, oil, etc., transported between sections of the country where these articles have attained a commercial and shipping importance which has made necessary specific rules for their transportation differing from those covering classified traffic, as well as a somewhat lower scale of rates than is applied to the latter. The standard freight tariff is arranged to show the rates of the respective classes contained in the freight classification. In them are found the great majority of articles carried by the railways classified in accordance with the various elements that properly enter into the determination of freight charges. Under these are also found the commodities mentioned in the Special Freight Tariffs. Although these are exceptionally treated in some sections as to rates, they are all amenable to some rule of the classification. The rate-making foundation for all commodities is seen to be largely in the freight classification. 17th Annual Report, Inter-State Commerce Commission (1903), p. 116.

The intention of the Act is to require all freight to be carried under one or other of four tariffs, Standard, Special, Competitive, or Joint, with the exception mentioned in section 275. (4). Special or joint tariffs are based upon the rules prescribed by the Act, and are controlled by the long and short haul clause, section 252 (3), but a competitive tariff is not. All three tariffs must be filed with the Board, (sections 261, 262, 273). The standard tariff requires the approval of the Board before it comes into force, and after such approval it must be published in the *Gazette*. In the case of special, competitive, and joint tariffs, prior approval by the Board is not required before these tariffs come into force, they are, however, subject subsequently to disallowance by the Board. Copies must be filed at the stations or offices of the company where freight is received, carried to, or delivered thereunder, (section 274, (b), (c) (d), and (f)). There is the same provision for standard tariffs, section 274 (a). These provisions, however, are all subject to regulation by the Board, section 274 (4), and in the case of competitive tariffs both filing and publication may be dispensed with by the Board, section 262 (4). Three days' previous notice must be given in the case of special tariffs of any reduction and ten days' previous notice of an increase before either comes into effect.

260. The Standard Freight Tariff, or Tariffs, where the ^{What} company is allowed by the Board more than one Standard ^{Standard} Freight Tariff, shall specify the maximum mileage tolls to be ^{Freight} charged for each class of the freight classification for all dis- ^{Tariff to} tances covered by the company's railway. ^{specify.}

Such distances may be expressed in blocks or groups and such blocks or groups may include relatively greater distances for the longer than for the shorter hauls.

2. The Special Freight Tariffs shall specify the toll or tolls, ^{What} lower than in the Standard Freight Tariff, to be charged by ^{Special} the company for any particular commodity or commodities, or ^{Freight} for each or any class or classes of the freight classification, or ^{Tariffs to} to or from a certain point or points on the railway, greater ^{specify.}

tolls not being charged therein for a shorter than a longer distance over the same line in the same direction, the shorter being included in the longer.

What
Compe-
titive
Tariffs
to
specify.

3. The Competitive Tariffs shall specify the toll or tolls lower than in the Standard Freight Tariff, to be charged by the company for any class or classes of the freight classification, or for any commodity or commodities, to or from any specified point or points which the Board may deem, or have declared, to be competitive points not subject to the long and short haul clause under the provisions of this Act.

Standard
Freight
Tariff to
be filed
and ap-
proved.
To be
published
in *Canada
Gazette*.

261. Every Standard Freight Tariff shall be filed with the Board, and shall be subject to the approval of the Board.

Until
filed, etc.,
no toll to
be
charged.

2. Upon any such tariff being filed and approved by the Board the company shall publish the same, with a notice of such approval in such form as the Board directs in at least two consecutive weekly issues of *The Canada Gazette*.

Upon
compli-
ance with
this sec-
tion what
tolls
author-
ized to be
charged
for
freight.

3. Until the company files its Standard Freight Tariff or Tariffs as the case may be, with the Board, and such tariff or tariffs is, or are, so approved and published, no toll shall be charged by the company.

Special
freight
tariffs,
etc., to
be filed.

4. When the provisions of this section have been complied with, and except in the cases of Special Freight and Competitive Tariffs, the tolls as specified in the Standard Freight Tariff or Tariffs, as the case may be, shall be the only tolls which the company is authorized to charge for the carriage of goods.

Where
reduce

262. Special Freight Tariffs and Competitive Tariffs shall be filed by the company with the Board, and every such tariff shall specify the date of the issue thereof and the date on which it is intended to take effect.

2. When any such special freight tariff reduces any toll previously authorized to be charged under this Act, the company shall file such tariff with the Board and shall publish the same

in the manner in section 274 in such case provided, three ^{tolls pre-}days previous to the date on which such tariff is intended to ^{viously}take effect. When any such special freight tariff advances ^{in force.} any toll previously authorized to be charged under this Act, ^{Where}the company shall in like manner file and publish such tariff ^{advance.}ten days previous to the date on which such tariff is intended to take effect.

3. Upon any such special freight tariff being so filed, the ^{When}company shall, until such tariff is superseded or is disallowed ^{company}by the Board, charge the toll or tolls as specified therein, and ^{author-}such special freight tariff shall supersede any preceding tariff or ^{ized to}charge ^{tolls}tariffs, or any portion or portions thereof, in so far as it reduces ^{specified}or advances the tolls therein. ^{in special}freight ^{tariffs,}

4. In the case of Competitive Tariffs, where it may be ^{etc.}necessary to meet the exigencies of competition, or as to the ^{Board}Board may seem expedient, the Board may make rules and ^{may make}regulations governing the filing or publication of the same, and ^{regula-}may provide that any such tariffs may be acted upon and put ^{tions as}in operation immediately upon the issue thereof by the com- ^{to filing}pany, before they have been filed with the Board as required ^{of com-}petitive ^{tariffs.}tariffs, by this Act.

263. The tariffs of tolls which the company shall be autho- ^{Sub-}rized to issue under this Act for the carriage of passengers ^{division}between points on the railway shall be divided into two classes, ^{of pas-}senger ^{tariffs.}tariffs, namely:

The Maximum Mileage Tariff, herein referred to as the ^{Standard.}Standard Passenger Tariff;

And Reduced Passenger Tariffs, herein referred to as Special ^{Special.}Passenger Tariffs.

2. The Standard Passenger Tariff shall specify the maximum ^{What}mileage tolls to be charged for passengers for all distances ^{standard}covered by the company's railway; such distances may be ^{passenger}expressed in like manner as provided herein in respect of Stan- ^{tariff}dard Freight Tariffs. ^{shall}specify.

What special passenger tariffs shall specify.

3. Special Passenger Tariffs shall specify the toll or tolls to be charged by the company for passengers in every case where such tolls are lower than the tolls specified in the company's Standard Passenger Tariff.

The same general provisions as to filing and publication are applicable to Passenger as to Freight Tariffs. No provision is made for Competitive Passenger Tariffs. It will be noted that in the case of both Freight and Passenger Tariffs no tolls shall be charged by the company until the requirements of the Act are complied with. These provisions are similar to section 227 of the former Act (1888). In a case where the tolls have voluntarily been paid the case of *Lces v. Ottawa & New York R.W. Co.*, 31 O.R. 567, that the amount so paid cannot be recovered back where it is such as in equity and good conscience ought to have been paid, may still apply.

Standard passenger tariff to be filed approved and published.

Otherwise no tolls to be charged by company.

Tolls authorized to be charged upon compliance.

Special passenger tariffs have to be filed and published.

264. A Standard Passenger Tariff shall be filed, approved and published in the same manner as required by this Act in the case of a Freight Standard Tariff.

2. Until the company files its Standard Passenger Tariff and such tariff is so approved and published in *The Canada Gazette*, no tolls shall be charged by the company.

3. When the provisions of this section have been complied with, and except in the case of Special Passenger Tariffs, the tolls in the Standard Passenger Tariff shall be the only tolls which the company is authorized to charge for the carriage of passengers.

265. All Special Passenger Tariffs shall be filed by the company with the Board, and published as required by section 274, three days before any such tariff is intended to take effect, or within such time, or in such manner, as the Board, owing to the exigencies of competition or otherwise, may require.

The date of the issue and the date on which, and the period, if any, during which, any such tariff is intended to take effect, shall be specified thereon.

2. Upon any such tariff being so duly filed the company shall, When until such tariff is superseded or is disallowed by the Board, ^{tolls} charge the toll or tolls as specified therein, and such tariff shall ^{author-} supersede any preceding tariff or tariffs, or any portion or por- ^{ized} tions thereof, in so far as it reduces or advances the tolls there- ^{to be} in, but until such tariff is so duly filed, no such toll or tolls charged. shall be charged by the company.

266. Where traffic is to pass over any continuous route in ^{Joint} Canada operated by two or more companies, the several com- ^{tariffs} panies may agree upon a joint tariff for such continuous route, ^{where} and the initial company shall file such joint tariff with the ^{agreed} Board, and the other company or companies shall promptly ^{upon for} notify the Board of its, or their essent to and concurrence in ^{through} such joint tariff. The names of the companies whose lines com- ^{traffic in} pose such continuous route shall be shewn by such tariffs. ^{Canada.}

This section apparently is taken from sub-section 5, of section 6, of the Inter-State Commerce Act, with the exception that the several common carriers operating the "continuous lines or routes" are each required to file copies of the joint tariffs, while in this section the initial company files such tariff, and the other companies joining therein signify their concurrence. Section 6, Inter-State Commerce Act, provides in addition that if any common carrier neglects or refuses to file and publish such tariff, it shall, in addition to the penalties prescribed in the Act, be subject to a Writ of Mandamus at the instance of the Commission, and an injunction to restrain it from receiving or transporting freight. *I. C. C. v. Seaboard R.W. Co.*, 82 Fed. Rep. 563. The corresponding provisions in this Act for enforcing the Orders of the Board and as to penalties are sections 35 and 279.

267. In the event of failure by such companies to agree upon ^{Where} any such joint tariff as provided in the next preceding section, ^{failure} the Board on the application of any company or person desiring ^{to agree.} to forward traffic over any such continuous route, which the ^{Power of} Board considers a reasonable and practicable route, or any por- ^{Board.}

Order. tion thereof, may require such companies, within a prescribed time, to agree upon and file in like manner a joint tariff for such continuous route, satisfactory to the Board, or may, by order, determine the route, fix the toll or tolls and apportion the same among the companies interested, and may determine the date when the toll or tolls so fixed shall come into effect, and traffic shall be carried by the companies in accordance therewith.

Upon order Company to file joint tariff. 2. Upon any such order being made the company shall as soon as possible, or within such time as the Board may require, file and publish a Joint Tariff in accordance with this Act and in accordance with such order.

Apportionment of through rate. 3. In any case when there is a dispute between companies interested as to the apportionment of a through rate in any Joint Tariff, the Board may apportion such rate between such companies.

Power of Board. 4. The Board may decide that any proposed through rate is just and reasonable, notwithstanding that a less amount may be allotted to any company out of such through rate than the toll such company would otherwise be entitled to charge.

Section 25, sub-sections 1-9, and section 26 of the Railway & Canal Traffic Act 1888, contain similar provisions for obtaining a through rate by any person or company requiring the traffic to be forwarded. The provisions requiring an application to the company before applying to the Commissioners are omitted from this section.

If an objection is made to granting the route or rate the Commissioners shall consider (sub-section 5, Ry. & C. Act) whether the granting of the rate is a *due and reasonable facility* in the interest of the public, and whether, having regard to the circumstances, the route proposed is a *reasonable route*, and shall allow or refuse the rate accordingly, or fix such other rate as may seem to the Commissioners *just and reasonable*.

Sub-section 3 of this section is reproduced from sub-section 6 of the English Act. Sub-section 4 is the same as section 26,

except that by sub-section 9 of the English Act, it shall not be lawful for the Commissioners to compel any company to accept lower mileage rates than the rates which such company may be legally charging for like traffic by a like mode of transit on any other line between the same points. This restriction on sub-section 4 is omitted from the present Act.

The Commissioners by sub-section 8 of the English Act are to take into consideration in apportioning the through rate all the circumstances of the case, including any special expense incurred in the construction, maintenance, or working of the route, and any special charges the company are entitled to make. This sub-section is also omitted from the present section, but such circumstances seem to be proper for consideration by the Board.

In the case of alternative routes, the Commissioners decided that the longer and much more expensive (owing to double expense at the junctions) route, which gave a much greater mileage to one company than the other, was not a "reasonable" route. *E. & W. Junction R.W. Co. v. Great Western R.W. Co.*, 1 Nev. & Mac. 331; see also *Caledonian R.W. Co. v. North British R.W. Co.*, 3 Nev. & Mac. 403.

There are no provisions corresponding in the Inter-State Commerce Act, and the Inter-State Commerce Commission has no power to enforce a through rate upon companies whose lines connect.

268. Where traffic is to pass over any continuous route from a point in Canada through a foreign country into Canada, or from any point in Canada to a foreign country, such route being operated by two or more companies whether Canadian or foreign, the several companies shall file with the Board a Joint Tariff for such continuous route. From
Canada
into
foreign
country.

2. Any goods carried or being carried from Canada through a foreign country into Canada, in violation of this section, shall, before being admitted into Canada, be subject to customs duties, as if such goods were of foreign production and coming into Canada for the first time, and, in case such goods are of a kind which would not otherwise be subject to any customs Penalty
for viola-
tion.

Goods
subject to
customs
duties.

Liability
of com-
pany for
duties.

duties hereunder, shall be subject to a customs duty of thirty per centum of the value thereof; and if any such duty is paid by the consignor or consignee of such goods, the same shall be repaid to the persons so paying, on demand, by the Canadian company or companies. Any law to the contrary is hereby repealed or amended in so far as is necessary to give effect to this section.

This section is similar in its terms to the Inter-State Commerce Act, section 6 (2).

The word "to" in the phrase "or from any point in Canada to a foreign country," is used to express the *destination* of the property by continuous carriage: it does not signify "at the boundary line." Such a construction is obviously very narrow and technical; it would render the law nugatory; and a broader meaning was necessarily intended. The word "to" in this connection means the destination of the property at any place within the state or country to which the continuous carriage extends. So held by the Inter-State Commerce Commission when dealing with the corresponding section of the Inter-State Commerce Act, *supra*. *Re Grand Trunk R.W. Co.*, 2 I.C. Rep. at p. 501, when the Act was held to apply to foreign as well as domestic common carriers engaged in the transportation of passengers or property for a continuous carriage or shipment, from a place in the United States to a place in an adjacent foreign country (Canada).

The joint tariff referred to in this section results where two companies own connecting roads and unite in making a *joint through tariff*, thus forming practically a new and independent line. Under the Inter-State Commerce Act it has been held that a through tariff on a joint line is not the standard by which the separate tariff of either company is to be measured or condemned; *Chicago R.W. Co. v. Osborne*, 52 Fed. Rep. 917.

Through (*i.e.*, joint) rates are not required to be made on a strictly mileage basis, but mileage is, as a general rule, an element of importance; and due regard to distance proportions should be observed in connection with the other considerations that are material in fixing transportation charges: *McMorran v. Grand Trunk R.W. Co.*, 2 I.C. Rep. 604.

269. As respects all traffic which shall be carried from any point in a foreign country into Canada, or from a foreign country through Canada into a foreign country by any continuous route owned or operated by any two or more companies, whether Canadian or foreign, a Joint Tariff for such continuous route shall be duly filed with the Board.

A foreign company must comply with this section: *Re Grand Trunk R.W. Co., supra.*

270. The expression "Canadian company" in the last two preceding sections shall mean and include any company owning or operating so much of any continuous line or route as lies in Canada.

271. The facilities to be afforded as required by section 253 shall include the due and reasonable receiving, forwarding and delivering by the company, at the request of any other company, of through traffic, and in the case of goods shipped by car load of the car with the goods shipped therein, to and from the railway of such other company, at a through rate, and also the due and reasonable receiving, forwarding and delivering by the company, at the request of any person interested in through traffic, of such traffic at through rates. 1 Edw. VII., c. 32, s. 1, Am.

This section has been considered with section 253, *supra*.

272. No company shall, by any combination, contract or agreement, express or implied, or by other means or devices, prevent the carriage of goods from being continuous from the place of shipment to the place of destination; and no break in bulk, stoppage or interruption made by such company shall prevent the carriage of goods from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act.

Section 272 is taken almost *verbatim* (omitting after “prevent” the words “*by change of time schedule, carriage in different cars*”), from section 7, Inter-State Commerce Act. It is supplemental to the provisions of section 3, Inter-State Commerce Act (see section 253 (1)), and should be read and construed therewith.

In *Board of Trade of Troy v. Alabama Midland R.W. Co., et al.*, 6 I.C. Rep. 2, the Inter-State Commerce Commission held that the continuity of carriage of freight over a line formed by two or more roads, is not broken in *fact*, and cannot be broken in *law*, by the charge of a local rate by one (or more) of such roads as its proportion of the through rate.

This section is not confined to a continuous carriage within Canada. It extends to “one continuous carriage from the place of shipment to the place of destination,” even though the boundary line of a foreign country may be crossed on the route. So held in *Re Grand Trunk R.W. Co.*, 2 I.C. Rep. 496, in the case of shipments from Buffalo, Black Rock, and Suspension Bridge, in the United States, to Hamilton, Dundas, and several other points in Canada, where a rebate was made to certain consignees in Hamilton, Dundas, etc., and denied to others.

Filing
and
publica-
tion of
joint
tariffs.
When
tolls
therein
to be
charged.
Proviso:
foreign
com-
panies.
Informa-
tion as to
propor-
tion of
through
rate re-
ceived by
each
company.
Tariffs
to be
open to
public in-
spection.

273. Joint tariffs shall, as to the filing and publication thereof, be subject to the same provisions in this Act as are applicable to the filing and publication of local tariffs of a similar description; and upon any such joint tariff being so duly filed with the Board, the company or companies shall, until such tariff is superseded or is disallowed by the Board, charge the toll or tolls as specified therein: Provided that the Board may except from the provisions of this section the filing and publication of any or all passenger tariffs of foreign railway companies.

2. The Board may require to be informed by the company of the proportion of the toll or tolls, in any joint tariff filed, which it or any other company, whether Canadian or foreign, is to receive or has received.

274. The company shall deposit and keep on file in a convenient place open for the inspection of the public, during office hours, a copy of each of its tariffs at the respective places mentioned, as follows:—

(a.) Standard Passenger and Freight Tariffs at every station or office of the company where passengers or freight, respectively, are received for carriage thereunder. Standard tariffs.

(b.) Special Passenger and Freight Tariffs at every station or office of the company where passengers or freight, respectively, are received for carriage thereunder, and, as to such freight tariffs, as soon as possible, at each of its stations or offices to which freight traffic is to be carried thereunder. Special tariffs.

(c.) Competitive Tariffs at each freight station or office of the company where goods are to be received and delivered thereunder. Competitive tariffs.

(d.) Joint Tariffs under sections 266 and 267 at each freight station or office where traffic is to be received, and at each freight station to which such tariffs extend. Joint tariffs under secs. 266, 267.

(e.) Joint Tariffs under section 268 at each freight station or office where such traffic is to be received and at each freight station or office in Canada to which it is to be carried as its destination. Joint tariffs under sec. 268.

(f.) Joint Tariffs under section 269 at each freight station or office in Canada to which such tariffs extend. Joint tariffs under sec. 269.

2. The company shall keep on file at its stations or offices where freight is received and delivered, a copy of the freight classification, or classifications, in force upon the railway, for inspection during business hours. Publication of freight classification.

3. The company shall post up in a prominent place at each of its stations where passengers or freight, respectively, are received for carriage, a notice in large type directing the public attention to the place in such station where the passenger or freight tariffs, respectively, are kept on file for public inspection. Notice to be posted at stations of place where tariffs

open to
inspection.

tion during business hours, and the station agent, or person in charge at such station, shall produce to any applicant on request any particular tariff in use at that station which he may desire to inspect.

Power of
Board
as to
publica-
tion of
tariffs.

4. Notwithstanding anything in this section, the Board may, in addition to, or in substitution of, the publication of any tariff required by this section, by regulations or otherwise determine and prescribe the manner and form in which any such tariff shall be published or kept open by the company for public inspection, and may exempt from any such publication any competitive tariffs or any joint tariff under sections 268 or 269. 51 V., c. 29, s. 230, Am.

This section follows generally upon the lines of section 6 of the Inter-State Commerce Act, known as the "*Publicity Section*," except that the freight and passenger tariffs must be posted up in two conspicuous places in every depot, station, or office where passengers or freight respectively are received for transportation, in such form that they can be accessible to the public. A practice seems to have prevailed in the United States of stating the place where such tariffs could be seen. This, it was decided, was not a compliance with the Inter-State Commerce Act: *Rea v. Mobile & Ohio R.W. Co.*, 7 I.C. Rep. 43; *Johnson v. C. St. P., M. & O. R.W. Co.*, 9 I.C. Rep. 221. It has been adopted in this section, however, as more convenient, as such tariffs in practice are frequently removed unless kept in a secure place.

In the Inter-State Commerce Act, the terminal charges are required to be stated separately in the schedules or tariffs of rates and charges for the transportation of property. By the interpretation clause, section 2 (*n*), toll or rate includes terminal charges, but there does not appear to be any particular provision in this Act requiring these to be separately specified.

General Provisions Respecting Carriage.

Con-
tracts,
etc., im-
pairing
carrier's
liability.

275. No contract, condition, by-law, regulation, declaration, or notice made or given by the company impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall relieve the company from such liability, except as herein-

after provided, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the Board.

2. The Board may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired, restricted, or limited; and may by regulation prescribe the terms and conditions under which any traffic may be carried by the company. Power of Board.

Sub-sections one and two are new provisions, and should be read with section 214 (3). In the notes to section 214 there is a full discussion of the classes of cases in which contracts may be made limiting the company's liability. Such contracts must now be first approved by the Board.

The Canadian Freight Classification No. 12, as approved by the Board on 30th July, 1904, (see *Canada Gazette*, 1904, p. 195), contains a number of "Special Regulations and Conditions" with regard to such contracts, some of which are here noticed.

By rule 7 "Owner's Risk" is recognized, in the case of articles so marked in the classification. There is also a provision that if the shippers decline to accept receipts so endorsed, the goods may be received on ordinary shipping notes and receipts without such endorsement, at 50 per cent. in addition to the rates which would be charged if shipped at *owner's risk and released*, with the exception of plate or mirror glass, for which special provision is made. See *Cobban v. Canadian Pacific R.W. Co.*, 26 O.R. 732.

Special provisions are made in this Classification for the carriage of live stock, referred to by McMahon, J., in *Robertson v. Grand Trunk R.W. Co.*, 24 O.R., at p. 85, and the terms on which owners or drovers may be taken free on the same train with their live stock in consideration of their assuming the risks and obligations mentioned in the contract to be signed by them. See *Bicknell v. Grand Trunk R.W. Co.*, 26 A.R. 431. The rates and classification of live stock are based upon a maximum value, in case of horses of \$100, cattle \$50, etc., each fully released in accordance with the terms of their Special Live Stock Transportation Contracts. There are further special regula-

tions for live stock and valuable animals to be taken by special arrangement as to values and rates where not released. See p. 70 of Classification.

Provision is also made that "in cases where shippers, owners, or agents, decline to enter into such contracts, the traffic may be taken at double rates, under ordinary liability as common carriers," (p. 69); with a number of similar provisions for analogous cases. These provisions are of course subject to revision from time to time by the Board, and will probably be the subject of further judicial decision.

Carriage,
etc., of
certain
traffic
allowed
free or at
reduced
rates.

3. Nothing in this Act shall be construed to prevent the carriage, storage or handling of traffic free or at reduced rates for the Dominion, or any provincial or municipal government, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the carriage, free or at reduced rates, of destitute or homeless persons, transported by charitable societies, and the necessary agencies employed in such transportation; nor to prevent the issuance of mileage, excursion or commutation passenger tickets, or the carriage at reduced rates of immigrants or settlers and their goods and effects, or any member of any organized association of commercial travellers with his baggage; nor to prevent railways from giving free carriage or reduced rates to their own officers and employees, or their families, or for their goods and effects, or to members of the Provincial Legislatures or of the press, or to such other persons as the Board may approve or permit; nor to prevent the principal officers of any railway, or any railway or transportation company, from exchanging passes or free tickets with other railways, or railway or transportation companies, for their officers and employees and their families, or their goods and effects; provided that the carriage of traffic by the company under this sub-section may, in any particular case or by general regulation, be extended, restricted, limited or qualified by the Board.

This sub-section is taken from section 22, Inter-State Commerce Act, with appropriate alterations to suit political conditions. The provision as to carriage at reduced rates of immigrants or settlers is new; also the last provision for the carriage of traffic in any particular case or by general regulation. There is a provision in section 22, Inter-State Commerce Act, permitting the issuance of joint interchangeable 5,000-mile tickets with special privileges for free luggage, which has not been adopted in this Act. A very important provision of section 22, Inter-State Commerce Act, has been omitted from this section, viz.: "*Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies;*" and the provision that no pending litigation shall be affected. For a discussion of the objects of the Inter-State Commerce Act, see *Tift v. Southern R.W. Co.*, 123 Fed. Rep. 789; *Atchison R.W. Co. v. Denver R.W. Co.*, 110 U.S. 667; *I. C. C. v. Cincinnati R.W. Co.*, 167 U.S. 479.

At common law the common carrier was bound to receive and transport all goods offered on receiving reasonable compensation for such carriage. The carrier could not lawfully enforce unreasonable charges. Subject to the two leading prohibitions, that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage, the Inter-State Commerce Act left common carriers, as they were at common law, free to make special contracts for increasing their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their business on the same principles as are adopted in other trades and pursuits: *I. C. C. v. Alabama Midland R.W. Co.*, 168 U.S. 144; *I. C. C. v. E., T., V. & G. R.W. Co.*, 181 U.S. 1; *Behlmer v. L. & N. R.W. Co.*, 169 U.S. 644, 175 U.S. 648.

Under this Act, in addition to the powers possessed by the Inter-State Commerce Commission, the Board prescribes the tolls which shall be charged, and decides what are reasonable rates.

4. Notwithstanding anything in this Act, the Board may make regulations permitting the company to issue special rate notices prescribing tolls, lower than the tolls in force upon the ^{Special rates for} specific

ship-
ments
may be
allowed
by Board.

railway, to be charged for specific shipments between points upon the railway, not being competitive points, where it considers the charging of the special tolls mentioned in any such notices will help to create trade or develop the business of the company or be in the public interest, and not otherwise contrary to the provisions of this Act; every such special rate notice or a duplicate copy thereof, shall be filed with the Board, and shall exist merely for the purpose of giving effect to the special rate charged for the specific shipment mentioned therein.

Members
of Parlia-
ment and
Board
to have
free
trans-
portation.

5. The company shall furnish free transportation upon any of its trains for members of the Senate and House of Commons of Canada with their baggage, and also for the members of the Board, and for such officers and staff of the Board as the Board may determine, with their baggage and equipment, and shall also, when required, haul free of charge any car provided for the use of the Board.

The following cases have been decided by the Board under this sub-section:—

A separate and distinct application must be made in each case in which a special rate is asked to be permitted by the Board to enable it to judge of the effect of its order upon other industries, shippers, and dealers: *Re Canadian Freight Association*, 3 Can. Ry. Cas. 427.

An application by the Grand Trunk R.W. Co. for authority to reduce the rates on bituminous coal to a certain place, used for manufacturing purposes, by 10 cents per ton below the published rate charged to other shippers, was refused, on the ground that even if it were proved that certain manufacturers were unable to pay the high rate and carry on business successfully, the allowance of a reduction in the freight rate on any article of merchandise to one class of shippers, and the refusal of the same rate to another class, is unjust discrimination, and forbidden by section 252: *Manufacturers' Coal Rates Case*, 3 Can. Ry. Cas. 438.

Traffic by Water.

Carriage
of traffic
by water.

276. When the company owns, charters, uses, maintains or works, or is a party to any arrangement for using, maintaining or working vessels for carrying traffic by sea or by inland water,

between any places or ports in Canada, the provisions of this Act in respect of tolls shall, so far as they are applicable, extend to the traffic carried thereby.

Traffic Over or Through Certain Railway Bridges or Tunnels.

277. When any company has power under any Special Act to construct, maintain and operate any bridge or tunnel for railway purposes, or for railway and traffic purposes, and to charge tolls for traffic carried over, upon, or through such structure by any railway, the provisions of this Act in respect of tolls shall, so far as they are applicable, extend to such company and to the traffic so carried.

Express Companies.

278. Every company which grants any facilities for the carriage of goods by express to any incorporated express company or person, shall grant equal facilities, on equal terms and conditions, to any other incorporated express company which demands the same. 51 V., c. 29, s. 242.

There is no jurisdiction under the Act to enquire into the reasonableness of the rates charged by Express Companies. So decided in *Vickers Express Company v. Canadian Pacific R.W. Co., and Dominion Express Co.*, 9 O.R. 251, 13 A.R. 210.

The employment of the station agents of a railway company to act as agents of an express company, with the privileges they have at stations, is a *facility* within the meaning of this section. Such privilege cannot be granted to one express company and refused to another: *Ibid.*

The company may decline altogether to permit an express business to be done on its line by an express company. As put by the U. S. Supreme Court, it is not a "common carrier of common carriers." *Express Companies' Cases*, 117 U.S. 1.

An express company is not bound to carry except according to its profession, and is entitled to discriminate as to its customers. It is not confined by any rule or regulation as to the charges it may make, provided they are reasonable. *Johnson*

v. *Dominion Express Co.*, 28 O.R. 203. Accordingly in the latter case it was held that the defendants could not be compelled to carry "packed parcels," i.e., a large number of small parcels packed together in one large parcel, at their usual tariff for single parcels by size and weight.

This section has been re-enacted in the present Act without amendment. The powers of the Board as to tolls and the various matters referred to in the preceding sections do not apply to express companies. Express companies do not come under the operation of the Inter-State Commerce Act. 1, I.C. Rep. 677.

Penalties and Actions.

Penalties
for viola-
tion of
Act as to
tolls.

279. The company or any director or officer thereof, or any receiver, trustee, lessee, agent or person, acting for or employed by the company, who, alone or with any other company or person, shall wilfully do or cause to be done, or shall willingly suffer to be done, any act, matter or thing, contrary to the provisions of, or to any order, direction, decision or regulation of the Board, made or given under this Act in respect of tolls, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter or thing thereby required to be done, or shall cause or willingly suffer or permit any act, matter or thing so directed or required thereby to be done, not to be so done, or shall aid or abet any omission or failure, or shall be guilty of any infraction of any such order, direction, decision or regulation, or any of such provisions of this Act, or shall aid or abet therein, shall for each offence be liable to a penalty of not more than one thousand dollars, nor less than one hundred dollars. 51 V., c. 29, s. 241, Am.

Penalties
for false
billing by
company.

2. Any company or any officer or agent thereof, or any person acting for or employed by the company, who, by means of false billing, false classification, false report of weight, or by any other device or means, shall knowingly, wilfully, or shall willingly suffer or permit any person or persons to obtain transportation for goods at less than the required tolls then author-

ized and in force on the railway of the company, shall for each offence be liable to a penalty of not exceeding one thousand dollars nor less than one hundred.

Penalties
for false
billing by
shippers,
etc.

3. Any person or any officer or agent of any incorporated company who shall deliver goods for transportation to the company, or for whom as consignor or consignee the company shall transport goods, who shall knowingly or wilfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the company, its agent or agents, obtain transportation for such goods at less than the regular tolls then authorized and in force on the railway, shall for each offence be liable to a penalty of not exceeding one thousand dollars, nor less than one hundred dollars. The Board may make regulations providing that any such person or company shall, in addition to the regular toll, be liable to pay to the company a further toll not exceeding fifty per cent. of the regular charge. The company may, and when ordered by the Board shall, open and examine any package, box, case, or shipment, for the purpose of ascertaining whether this sub-section has been violated.

4. Any person or company, or any officer or agent of any company, who shall offer, grant, or give, or shall solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any traffic by the company, whereby any such traffic shall by any device whatsoever, be transported at a less rate than that named in the tariffs then in force, or for whom the company, or any of its officers or agents, shall by any such means be induced to transport traffic, and thereby to discriminate unjustly in his, its, or their favour as against any other person or company, or who shall aid or abet the company in any unjust discrimination, shall for each offence be liable to a penalty not exceeding one thousand dollars nor less than one hundred dollars.

Penalties
for in-
ducing
unjust
discrimin-
ation.

Tariff
binding
on
company.

5. Whenever the company files with the Board any tariff, and such tariff comes into force and is not disallowed by the Board, under this Act, or participates in any such tariff, the tolls in such tariff, while so in force, shall as against such company, its officers, agents or employees, in any prosecution under this Act, be conclusively deemed to be the legal tolls chargeable by such company, and any departure therefrom shall be an offence under this Act.

Actions
for
treble
damages.

6. The Company shall, in addition to any penalty in this section provided, be liable at the suit of any person injured to three times the amount of the actual damage he may be proved to have sustained, by reason of any infraction by the company or any officer, servant, or agent of the company, of any of the provisions of, or of any order, direction, decision, or regulation made or given by the Board under this Act in respect of tolls. 51 V., c. 29, s. 290, Am.

Leave of
Board
neces-
sary.

7. No prosecution shall be had or instituted for any penalty provided under this section, nor shall any action be commenced for any treble damages under this section without the leave of the Board first being obtained.

Section 241 of the former Act has been discarded. The first sub-section is taken largely from the Inter-State Commerce Act, section 10 (1), (as amended March 2, 1889), omitting the provision for a fine of \$5,000 for each offence which made a misdemeanour punishable in the Circuit Court of the United States within whose jurisdiction such offence is committed; also the provision for imprisonment of the offender for a term not exceeding two years where the offence is an unlawful discrimination in rates; the penalty of imprisonment was abolished by the Elkins Act, February 19th, 1903, and the amount of the fine which might be imposed was increased to \$20,000.

Sub-section 2 is copied substantially from sub-section 2 of section 10, Inter-State Commerce Act, omitting its provisions that the offender shall be deemed guilty of a misdemeanour and upon *conviction in any court of competent jurisdiction* within the district in which such offence was committed, be subject to a fine not exceeding \$5,000. Imprisonment has been abolished.

Sub-section 3 also follows sub-section 3 of section 10 Inter-State Commerce Act, with similar omissions. The last two sentences in this sub-section are new, and not in the Inter-State Commerce Act.

Sub-sections 4 and 5 are copied from corresponding portions of the United States statute amending the Inter-State Commerce Act, passed February 19th, 1903, 32 Statutes at Large.

By the former section 290 (Act of 1888), the amount unjustly exacted was also recoverable. Section 8 of the Inter-State Commerce Act contains a similar provision.

The liability under this and the other sub-sections of section 279 is confined exclusively to a breach of duty under the sections relating to tolls, Nos. 251 to 277. The liability of the company under the remaining sections of the Act, and at common law, remains unchanged, but in respect of offences against these sections the common law is excluded, since the statute has not declared that the remedy given by it is not exclusive but cumulative. *Windsor Coal Co. v. Chicago R.W. Co.*, 52 Fed. Rep. 716.

For a recovery of treble damages under a State statute see *Union Pacific R.W. Co. v. Goodridge*, 149 U.S. 680.

An action by a shipper to recover a payment charged by the carrier in excess of charges to other shippers of similar goods was held to be an action for a penalty, and the plaintiff was held to strict proof in his complaint. *Parsons v. Chicago R.W. Co.*, 167 U.S. 447. See also *De Barg Baya Merchants' Line v. Jacksonville R.W. Co.*, 40 Fed. Rep. 392.

The similar provisions of the Inter-State Commerce Act creating a statutory liability against the carrier under sub-section 6 are in the nature of a penal statute, and the damages sought are in the nature of a penalty. As no time is mentioned in the Act within which the action may be brought to recover damages, the Statute of Limitations of the State in which the Court is situate will govern. *Ratican v. Terminal R.W. Co.*, 114 Fed. Rep. 666; *Murray v. Chicago R.W. Co.*, 92 Fed. Rep. 868.

A receiver of a railway company is bound to comply with the provisions of this section, as of the Inter-State Commerce Act, in like manner as the insolvent corporation which he represents as trustee. *United States v. De Coursey*, 82 Fed. Rep. 302.

The offence of "false billing" created by sub-section 3 is complete when the property is delivered for transportation, and such transportation to the place of destination is not essential to constitute the offence. The gist of the offence is the fraudulent act by which the lower rate is secured for the transportation of the property. *Davis v. United States*, 104 Fed. Rep. 136.

Actual discrimination in rates charged is necessary to constitute a violation of the Inter-State Commerce Act; and the mere making or offering of a discriminating rate, under which it is not shewn that any shipment was ever made, constitutes no legal injury to a shipper who is charged a higher rate: *Lehigh Valley R.W. Co. v. Rainey*, 112 Fed. 487.

The remedy of the shipper against the carrier to recover damages at common law remains until the Legislature enacts a statutory remedy. In such case the statutory remedy supercedes the common law remedy, unless the statute expressly declares such remedy to be cumulative and not exclusive: *Windsor Coal Co. v. Chicago R.W. Co.* (1892), 52 Fed. Rep. 716.

There is no section in this Act corresponding to section 22 of the Inter-State Commerce Act, which expressly provides that its provisions are in addition to the remedies now existing by common law or statute.

A "party-rate ticket" for ten persons may be issued at a rate less than that charged to one individual for like transportation on the same trip, without infringing this sub-section. *I. C. C. v. Balto & R.W. Co.*, 145 U.S. 263.

Collection of Tolls.

Enforcing
payment
of tolls.

280. In case of refusal or neglect of payment on demand of any lawful tolls, or any part thereof, the same shall be recoverable in any court of competent jurisdiction; or the agents or servants of the company may seize the goods for or in respect whereof such tolls are payable, and may detain the same until payment thereof, and in the meantime the said goods shall be at the risk of the owners thereof. 51 V., c. 29, s. 234, Am.

Sale of
goods to
recover
tolls.

2. If the tolls are not paid within six weeks, and where the goods are perishable goods, if the tolls are not paid upon de-

mand, or such goods are liable to be destroyed while in the possession of the company by reason of delay in payment or taking delivery by the consignee, the company may advertise and sell the whole or any part of such goods, and out of the money arising from such sale retain the tolls payable and all reasonable charges and expenses of such seizure, detention and sale, and shall deliver the surplus, if any, or such of the goods as remain unsold, to the person entitled thereto. 51 V., c. 29, s. 235, Am.

3. If any goods remain in the possession of the company un-^{Un-}claimed for the space of twelve months, the company may there-^{claimed}after, and on giving public notice thereof by advertisement for ^{goods.}six weeks in the *Official Gazette* of the province in which such ^{Notice.}goods are, and in such other newspapers as it deems necessary, sell such goods by public auction, at a time and place which ^{Sale.}shall be mentioned in such advertisement, and, out of the proceeds thereof, pay such tolls and all reasonable charges for storing, advertising and selling such goods; and the balance of the ^{Application of}proceeds, if any, shall be kept by the company for a further ^{proceeds.}period of three months, to be paid over to any person entitled thereto. 51 V., c. 29, s. 236.

4. In default of such balance being claimed before the ex-^{Un-}piration of the period last aforesaid, the same shall be deposited ^{claimed}with the Minister of Finance and Receiver General for the public ^{balances.}uses of Canada, but may be claimed by the person entitled thereto at any time within six years from the date of such deposit. 51 V., c. 29, s. 237, Am.

This section embraces four sections of the former Act as above indicated.

In sub-section 1 "refusal" has been substituted for "denial" in the first, and "lawful" for "such" in the second line.

In sub-section 2 an important and useful amendment has been made, in the case of perishable goods, providing for their immediate sale.

In sub-section 3 the original section is preserved unaltered; and in sub-section 4 the surplus, instead of being paid to the Minister of Finance, for the purpose mentioned until claimed, is deposited with him, and may be claimed within six years after such deposit.

The sections in the Act of 1888, are reproduced from the Act of 1879, 42 Vict., cap. 9, sec. 17.

In *Worden v. Canadian Pacific R.W. Co.*, 13 O.R. 652, decided under the same provisions in the Act of 1879 that the goods must remain in the defendant's possession for at least a year, unless the tolls have been demanded from the persons liable, it was held that the whole section must be read together, which shews that a demand is required. A post-card addressed to the plaintiff's address is not a sufficient demand, unless it is shewn to have reached him.

PART XII.

AGREEMENTS.

Amalgamation Agreements, secs. 281-283.

Traffic Agreements, sec. 284.

281. Where the company is authorized by any Special Agree-
Act of the Parliament of Canada, to enter into an agreement ^{ments for}
with any other company for selling, conveying or leasing to ^{sale,}
such company the railway and undertaking of the company; ^{lease, or}
in whole or in part, or for purchasing or leasing from such ^{amalgam-}
company, the railway and undertaking of such company, in ^{ation of}
whole or in part, or for amalgamation, such agreement shall ^{railway.}
be first approved by two-thirds of the votes of the shareholders ^{Approval}
of each company, parties thereto, at an annual general meeting, ^{of share-}
or at a special general meeting of each company called for the ^{holders.}
purpose of considering such agreement, at each of which meet- ^{Sanction}
ings shareholders representing at least two-thirds in value of the ^{of Gover-}
capital stock of each company are present or represented by ^{nor in}
proxy; and upon such agreement being so approved, and ^{Council}
duly executed it shall be submitted to the Board with an appli- ^{on recom-}
cation for a recommendation to the Governor in Council for ^{menda-}
the sanction thereof. ^{tion of}
^{Board.}

2. Notice of the proposed application therefor shall be pub- ^{Notice of}
lished in *The Canada Gazette* for at least one month prior to ^{applica-}
the time, to be stated therein, for the making of such applica- ^{tion to}
tion, and also, unless the Board otherwise orders, for a like ^{Board.}
period in one newspaper in each of the counties or electoral
districts through which the railway, to be sold, leased or am-
algamated, runs, in which a newspaper is published.

Action of
Board.

3. Upon such notice being given the Board shall grant or refuse such application, and upon granting the same shall make a recommendation to the Governor in Council for the sanction of such agreement.

Duplicate
original
to be
filed in
office of
Secretary
of State.

4. Upon such agreement being sanctioned by the Governor in Council, a duplicate original of such agreement shall be filed in the office of the Secretary of State for Canada, and thereupon such agreement shall come into force and effect, and notice thereof shall be forthwith given in *The Canada Gazette*, and the production of *The Canada Gazette* containing such notice shall be *prima facie* evidence of the requirements of this section being complied with.

Notice.

Power to amalgamate. Amalgamation without express statutory authority is a delegation by one company to another of the powers conferred upon it by Act of Parliament and as such is unlawful: *Hodges on Railways*, 7th Ed. 54; *Great Northern R.W. Co. v. Eastern Counties R.W. Co.*, 9 Hare 306; and it is equally unlawful on grounds of public policy for a railway company to agree to abstain from exercising its charter powers: *Montreal, etc., R.W. Co. v. Chateauguay, etc., R.W. Co.*, 35 S. C.R. 48, 4 Can. Ry. Cas. 83. If such an agreement is brought about in any manner as by the transfer of its stock by one company to another without any provision for its restoration, it is invalid: *Great Northern R.W. Co. v. Eastern Counties R.W. Co.*, *supra*, and where the London & North Western R.W. Co. were to work the lines of the Birkenhead R.W. Co., using its property and plant, and charging a fixed sum for working expenses, this was considered to be a virtual amalgamation and therefore void: *Winch v. Birkenhead, etc., R.W. Co.*, 16 Jur. 1035. The subject of leasing the line to another and amalgamating with it was discussed at length in *Carleton, etc., R.W. Co. v. Great Southern R.W. Co.*, 21 N.B.R. 339, where it was held in an action for an injunction that the Courts would not enforce an agreement by one company authorizing another to build a separate track alongside its own on its right of way and leasing a portion of its lands for that purpose. In *Beman v. Rufford*, 1 Sim. (N.S.) 550, an agreement that two companies should work a third company and have perfect control of it and exercise all

its rights and work it for twenty-one years, was considered to be illegal, but in *Midland R.W. Co. v. Great Western R.W. Co.*, L.R. 8 Ch. 841, at p. 858, Mellish, L.J., thought that while an agreement which practically amounts to a lease and which prevents the lessor company from entering into a contract with other companies might be invalid, yet a working agreement having no exclusive clauses in it would be valid even though the practical effect might be that the lessee company was the only one which from its geographical situation could practically work the line, the saving element in the latter contract being that the lessor might at any moment when it thought it advantageous, work the line again for its own benefit or enter into an agreement with some other company to do so.

Invalid leases or agreements for amalgamation must, however, be distinguished from mere working agreements which under 8 Vict., cap. 20, sec. 87 (Imp.), as under section 284 *infra*, might be perfectly valid as in *Llangelly R.W. Co. v. London, etc., R.W. Co.*, L.R. 7 H.L. 550, which provided that the defendants should, subject to plaintiffs' by-laws, have running powers over their lines, should maintain their own staffs at plaintiffs' offices and carry plaintiffs' traffic, if required (but only if required), by the latter. This agreement was upheld as being a mere working arrangement; but if such an agreement required the running company to operate the other's lines and guarantee a "toll" which was in effect a guarantee of dividends on the former's stock it would be invalid as a complete delegation of its powers: *Simpson v. Dennison*, 10 Hare 51, and where receipts were to be brought into one common fund and divided in fixed proportions it would be illegal: *Charlton v. Newcastle, etc., R.W. Co.*, 7 W.R. 731. A mere transfer of assets by one joint stock company to another will not thereby merge the two companies into one: *Maple Leaf Rubber Co. v. Brodie*, Q.R. 18 S.C. 352.

The cases in England upon the amalgamation of railways are numerous but turn generally upon the construction of terms contained in the special Acts authorizing such a course. They are collected in *Hodges on Railways*, pp. 54 to 57, and notes. Reference may particularly be made to *Shrewsbury, etc., R.W. Co. v. Shropshire, etc., R.W. Co.*, 6 H.L.C. 113, where the subject of amalgamation was much discussed and it was stated by Lord

Cranworth, at p. 131, that a railway company cannot grant a lease of its property and lines unless authorized by Act of Parliament to do so. See also notes to section 284, *infra*.

Amalgamation.

282. Upon any agreement for amalgamation coming into effect, as provided in the last preceding section, the companies, parties to such agreement, shall, subject to the provisions of this Act and the Special Act authorizing such agreement to be entered into, be deemed to be amalgamated, and shall form one company, under the name, and upon the terms and conditions in such agreement provided, and the amalgamated company shall possess and be vested with all the railways and undertakings, and all other the powers, rights, privileges, franchises, assets, effects, and properties, real, personal, and mixed, belonging to, possessed by, or vested in the companies, parties to such agreement, or to which they, or any or either of them, may be or become entitled, and shall be liable for all claims, demands, rights, securities, causes of action, complaints, debts, obligations, works, contracts, agreements, or duties, to as full an extent as any, or either, of such companies were at or before the time that the amalgamation agreement came into effect.

Undertakings, etc., vested in amalgamated company.

Saving of rights and claims.

283. Notwithstanding anything in any agreement made or sanctioned under the provisions of the last two preceding sections, every act, matter or thing, done, effected or confirmed under or by virtue of this Act or the Special Act before the date of the coming into effect of such agreement, shall be valid as if such agreement had never come into effect; and such agreement shall be subject, and without prejudice, to every such act, matter or thing, and to all rights, liabilities, claims and demands, present or future, which would be incident to, or consequent upon such act, matter or thing if such agreement had never come into effect, and in the case of an agreement, for amalgamation, as to all acts, matters and things so done, effected or confirmed, and as to all such rights, liabilities, claims

and demands, the amalgamated company shall for all purposes stand in the place of and represent the companies who are parties thereto, and the generality of the provisions of this section shall not be deemed to be restricted by any special Act, unless this section is expressly referred to in such special Act, and expressly limited or restricted thereby.

Apart from such a saving clause as this the Courts will always endeavour so to construe legislation approving of amalgamation so that the rights of those having claims against the original companies will be protected. Therefore an Act authorizing the union of two companies and declaring that any deed executed by them under the Act should be valid to "all intents and purposes in the same manner as if incorporated in the Act," while it gave the companies power to bargain in respect of their own rights gave them no legislative authority over the rights of third persons: *Cayley v. Cobourg, etc., R.W. Co.*, 14 Gr. 571; and see *Fargey v. Grand Junction R.W. Co.*, 4 O.R. 232; and *Demorest v. Midland R.W. Co.*, 10 P.R. 73. Such a saving clause would not in the absence of express declaration to the contrary be construed so as to render a company taking over another line, liable for claims not recoverable against the line so taken over: *Attorney General v. Macdonald*, 6 Man. L.R. 372; but where a joint traffic agreement was made with the Toronto, Grey & Bruce R.W. Co., which was attacked on the ground of *ultra vires*, it was held that defendants who had taken over that road and were bound to assume all its contracts the traffic being specially mentioned in the legislation sanctioning the amalgamation, were unable to contend that it was invalid even though such a contention might have been open to the Toronto, Grey & Bruce Railway: *Owen Sound, etc., Co. v. Canadian Pacific R.W. Co.*, 17 O.R. 691, 17 A.R. 482.

Traffic Agreements.

284. The directors may, at any time, make and enter into any agreement or arrangement, not inconsistent with the provisions of this or the Special Act, with any other company, either in Canada or elsewhere, for the interchange of traffic between their railways or vessels, and for the division and apportionment of tolls in respect of such traffic.

Traffic
agree-
ments.

Condi-
tions.

Board
may
exempt
from
condi-
tions.

2. The directors may also make and enter into any agreement or arrangements, not inconsistent with the provisions of this or the Special Act, for the running of the trains of one company over the tracks of another company, and for the division and apportionment of tolls in respect of such traffic, and generally in relation to the management and working of the railways, or any of them, or any part thereof, and of any railway or railways in connection therewith, for any term not exceeding twenty-one years, and to provide, either by proxy or otherwise, for the appointment of a joint committee for the better carrying into effect any such agreement or arrangement, with such powers and functions as are considered necessary or expedient,—subject to the like consent of the shareholders, the sanction of the Governor in Council upon the recommendation of the Board, application, notices and filings, as provided in section 281 with respect to amalgamation agreements, except that publication of notices in *The Canada Gazette* shall be sufficient, and that the duplicate original of such agreement or arrangement shall upon being sanctioned be filed with the Board: Provided that the Board may, by order or regulation, exempt the company from complying with any of the foregoing conditions with respect to any such agreement or arrangement made or entered into by the company for the transaction of the usual and ordinary business of the company, and where such consent of the shareholders is deemed by the Board to be unnecessary. 51 V., c. 29, ss. 238, 239, Am.

Saving.

3. Neither the making of any such arrangement or agreement, nor anything therein contained, nor any approval thereof, shall restrict, limit, or affect any power by this Act vested in the Board, or relieve the companies from complying with the provisions of this Act.

An agreement between a railway company and a steamship line for a fixed through rate and a rateable division of the pro-

ceeds is quite within the powers of a railway company: *Owen Sound Steamship Co. v. Canadian Pacific R.W. Co.*, 17 O.R. 691, 17 A.R. 482, and there is no principle of public policy which renders void a traffic agreement between two railways for the purpose of avoiding competition: *Hare v. London, etc., R.W. Co.*, 2 J. & H. 80, and a stipulation not to compete upon certain parts of the line is no such fraud upon the public as to render an agreement to that effect invalid: *Shrewsbury, etc., R.W. Co. v. Birmingham, etc., R.W. Co.*, 17 Q.B. 652, nor, *semble*, is an agreement that one of the contracting companies will not carry traffic over a particular portion of its line: *Lancaster, etc., R.W. Co. v. London, etc., R.W. Co.*, 2 K. & J. 293; but an agreement by one company not to operate its line is invalid: *Montreal, etc., R.W. Co. v. Chateauguay, etc., R.W. Co.*, 4 Can. Ry. Cas. 83, as is also an alienation by a company of the tolls to be earned upon a portion of its line, and directors have no power to make any such agreement: *Shrewsbury, etc., R.W. Co. v. Birmingham R.W. Co.*, 22 L.J. Ch. 682, nor have directors any power to enter into an agreement fixing and regulating the future traffic to be carried over a line which the company proposes to construct so as to give another company an interest in such traffic and the profits arising from it: *Midland R.W. Co. v. London, etc., R.W. Co.*, L.R. 2 Eq. 524; and where a working agreement respecting their existing lines has been made by two companies, it is not to be assumed that such companies are to be prohibited from constructing other lines to which it shall not apply and such an agreement if made would probably be *ultra vires*: *Midland R.W. Co. v. London, etc., R.W. Co.*, *supra*. A stipulation to divide profits earned on a common portion of the line is not invalid: *Shrewsbury, etc., R.W. Co. v. London, etc., R.W. Co.*, 17 Q.B. 652. Where one railway company grants to another the use of its lines, stations and facilities without any restriction upon such use, it cannot prevent the grantee from using the same for any lawful object even though it would have no power to make a similar use of them itself: *Great Northern R.W. Co. v. Eastern Counties R.W. Co.*, 9 Hare 306.

Traffic Agreements in Canada. The original of this clause was first enacted by 22 Vict., cap. 4, sec. 2, and the tendency of the Courts has been to construe it liberally. In *Michigan Central R.W. Co. v. Welleans*, 24 S.C.R. 309, at p. 317, Sedgwick, J., says: "The object of the legislature was to facilitate in every

possible way the operation and working of railways generally throughout Canada and to legalize the bringing in of foreign railways and the capital of foreign railway companies for that purpose. We are therefore required to give such a construction to the section in question as will best give effect to that policy provided we keep within the expressed intention of the legislature as manifested in the section itself." Accordingly an agreement by a foreign railway company with the Canada Southern R.W. Co., by which it took possession of the latter's line and was to "maintain, work and operate" it in the manner provided in the agreement, was upheld by the Supreme Court as valid, both under the above general clause and under the Special Act of the Canada Southern R.W. Co.; reversing in this respect, *Welleans v. Canada Southern R.W. Co.*, 21 A.R. 297. Where also an agreement was entered into pursuant to this section providing for the same rates on through traffic, a division of profits in specified proportions and the rendering of mutual statements; the agreement was considered to be valid so far as its terms were concerned, but as it was not pleaded that the necessary two-thirds majority of the shareholders had approved of it, it was treated as invalid on this account and the fact that such shareholders had subsequently in annual and other reports, been advised of it and had not objected was not treated as equivalent to their consent: *Great Western R.W. Co. v. Grand Trunk R.W. Co.*, 24 U.C.R. 107, 25 U.C.R. 37. An agreement between two companies for the purpose of combining their rolling stock plant and material and of working and operating both lines and exercising the franchises of both under the joint management of both companies for twenty-one years and of appointing a joint committee called an "Executive Committee" was upheld and it was laid down that similar but less elastic provisions in the companies' private statutes did not limit the operation of this general enactment. The case contains a review of many of the English decisions down to 1879: *Campbell v. Northern R.W. Co.*, 26 Gr. 522.

Maintenance of premises by working company. Where one company agreed to maintain the premises of another in substantial repair it was bound to repair damages due, as it contended, to natural causes or the original defective construction of the line: *North Eastern R.W. Co. v. Scarborough, etc., R.W. Co.*, 8 Ry. & C. Tr. Cas. 157. Under the power to "main-

tain" a railway, reasonable improvements consistent with the purpose of the undertaking are included: *Sevenoaks, etc., R.W. Co. v. London, etc., R.W. Co.*, 11 Ch. D. 625.

Approval of agreement by Governor in Council. This section and section 281 are evidently based on the English Railway Clauses Act 1863, 26 & 27 Vict., cap. 92, sec. 22, as amended by 36 & 37 Vict., cap. 48, sec. 10; but they have been a good deal altered and are less elaborate. It will be observed that the powers of the Board with reference to working agreements and agreements for amalgamation are advisory only, the Governor in Council being the body clothed with final authority to sanction or otherwise deal with the agreement. In England the Board of Trade and later the Railway Commissioners have had to consider a number of working agreements and the cases recording their decisions upon them are collected in Hodges on Railways (7th Ed.), pp. 527 to 530. It is said in that work at p. 527, that the Commissioners have regarded their duties in relation to the approval of working agreements as being (1), To ascertain that the companies have the power to enter into the agreement submitted for approval. (2), To ascertain whether if entered into, such working agreements will be advantageous to the interests of the public; and (3), To ascertain that their own powers under the Railways Clauses Act (1863), and the Regulation of Railways Act (1873), are not affected by the proposed agreement. The following cases on this subject may be consulted: *Huddersfield v. Great Northern, etc., R.W. Co.*, 4 Ry. & C. Tr. Cas. 44: *Re Taff Vale, etc., R.W. Co.'s working agreement* *ib.* 54.

Power of Board to vary agreements. Sub-section 3, *supra*, may be compared with the more elaborate but similar provision in 51 & 52 Vict., cap. 25, sec. 11 (Imp.), under which it was held that the Railway Commissioners might set aside an agreement previously entered into which required a railway company to accept no coal for carriage at one of its stations unless mined from the "Petre Estate": *Rishton v. Lancashire, etc., R.W. Co.*, 8 Ry. & C. Tr. Cas. 74. On this Wills, J., says at p. 81, "Section 11 of the Act of 1888 is more sweeping still and it seems to me that that also was passed for the very purpose of removing any possible doubt as to the jurisdiction of this Court to interfere with private arrangements of this kind when public considerations and the public interests require it."

PART XIII.

Insolvent Companies.

Directors
of
insolvent
railway
company
may file
scheme of
arrange-
ment in
Ex-
chequer
Court.

285. Where a company is unable to meet its engagements with its creditors, the directors may prepare a scheme of arrangement between the company and its creditors (with or without provisions for settling and defining any rights of shareholders of the company as among themselves, and for raising, if necessary, additional share and loan capital, or either of them) and may file it in the Exchequer Court with a declaration in writing, under the common seal of the company, to the effect that the company is unable to meet its engagements with its creditors, and with an affidavit of the truth of such declaration made by the president and directors, or by a majority of the president and directors, of the company, to the best of their respective judgment and belief. 1 Edw. VII., c. 31, s. 1, Am.

Effect of
filing.

2. After the filing of the scheme, the Exchequer Court may, on the application of the company on summons or motion in a summary way, restrain any action against the company on such terms as the Exchequer Court thinks fit. 1 Edw. VII., c. 31, s. 2, Am.

Notice of
filing.

3. Notice of the filing of the scheme shall be published in *The Canada Gazette*. 1 Edw. VII., c. 31, s. 3.

Effect of
notice.

4. After such publication of notice, no execution, attachment, or other process against the property of the company shall be available without leave of the Exchequer Court, to be obtained on summons or motion in a summary way. 1 Edw. VII., c. 31, s. 4, Am.

General remarks. This legislation which was only recently enacted, gives remedies other than those conferred by means of the appointment of a receiver on behalf of bondholders discussed in notes to sections 111 to 116, or for the sale of a railway which was dealt with under section 240. It is copied from the English Railway Companies Act, 1867, 31 & 32 Vict., cap. 127, secs. 6 to 21, with some amendments and omissions; but lacks the accompanying provision (section 4), that the rolling stock of a railway in operation shall not be seized under execution, but the creditor must levy by applying for the appointment of a receiver.

Constitutionality. Although the Province of Nova Scotia enacted similar legislation by 37 Vict., cap. 104, appearing at page 1 of the statutes of 1875, doubts were thrown upon its constitutionality in *Murdoch v. Windsor, etc., R.W. Co.*, Russ. Eq. R. (N.S.), 137, 3 Cart. 368, and in *Re Windsor, etc., R.W. Co.*, 16 N.S.R. 612, 3 Cart. 387, because by the B.N.A. Act, section 91 (21), legislation respecting "Bankruptcy and Insolvency" is within the exclusive jurisdiction of the Dominion of Canada and therefore in the *Murdoch Case* it was decided that there was no power to affect the rights of creditors even of a provincial railway company by a scheme drawn up pursuant to the Nova Scotian statute. Where, however, the proposed scheme merely amounted to a change in the character of the capital stock of the company it was held that for that purpose it could not be considered to be bankruptcy legislation and therefore unconstitutional and the scheme was approved: *Re Windsor, etc., R.W. Co.*, 16 N.S.R. 312, 3 Cart. 387. This statute was re-enacted in 1884 as R.S.N.S., cap. 54, but while not repealed, was not consolidated in the Revised Statutes of 1900.

In Quebec an Act was passed (56 Vict., cap. 36,) providing for the sequestration and sale of any railway subsidized by the local government and which either becomes insolvent or fails to carry out the obligations imposed upon it by its charter and this statute was held to be constitutional even though the railway had been declared to be a work for the general advantage of Canada: *Nantel v. Baie des Chaleurs R.W. Co.*, Q.R. 9 S.C. 47; *Baie des Chaleurs R.W. Co. v. Nantel*, Q.R. 9 Q.B. 64 (Hall and Wurtel, JJ., dissenting). It is doubtful whether this decision would be now followed as it in effect declares that a provincial statute may interfere with the road-

bed and operation of a Dominion railway: see *Madden v. Nelson, etc.*, *R.W. Co.* (1899), A.C. 626; *Canadian Pacific R.W. Co. v. Roy*, 1 Can. Ry. Cas. 196, and notes 2 Can. Ry. Cas. 265, *et seq.* As by section 91 of the B. N. A. Act, the Federal Parliament has jurisdiction in respect of "Bankruptcy and Insolvency," there is no doubt of its power to pass this legislation, and, conceivably, it could be made applicable to provincial as well as federal railways. It is not clear from the terms of the statute whether provincial railways could take the benefit of it. It was originally passed as an amendment to the Railway Act 1888, and not as a substantive statute: 1 Edw. VII., cap. 31, sec. 17, and presumably applies only to railways otherwise within the purview of that statute. The term "Company" appearing throughout the section is defined by section 2 (c), to mean "a railway company and includes any person having authority to construct or operate a railway" while by section 3, *ante*, the Railway Act is to "apply to all persons, companies and railways (other than Government railways) within the legislative authority of the Parliament of Canada." For the purpose of bankruptcy legislation, every company, however incorporated, may be within the legislative authority of Canada, and therefore there is nothing to prevent this part of the Act from applying to provincial as well as Dominion railway companies unless its incorporation in a statute otherwise intended to include the former only, supplies an argument to the contrary.

Scope of section. The settlement of creditors' claims is the object of the clause and any scheme providing for raising a large amount of loan capital without providing for the ultimate payment of creditors will not be sanctioned: *Re Letterkenny R.W. Co.*, I.R. 4 Eq. 538. In any such scheme the various classes of creditors must be fairly treated and it should show a reasonable prospect of providing for the ultimate payment of their claims: *Murdoch v. Windsor, etc.*, *R.W. Co.*, Russ. Eq. (N.S.), at p. 140; but a scheme which appears to be honestly framed with a view to the benefit of all parties will not be rejected because a portion of the assets comprised in it was appropriated for payment of debenture interest: *Re East & West India Dock Co.*, 44 Ch. D. 38, and a scheme for converting mortgages and bonds into irredeemable debenture stock is within the scope of the section: *Re Irish, etc.*, *R.W. Co.*, Ir. R. 2 Eq. 425, 3 Eq. 190; and see *Re Windsor, etc.*, *R.W. Co.*, 16 N.S.R. 312.

Effect on creditors. It will be observed that while by section 286, *infra*, provision is made for rendering a scheme binding on debenture holders, the holders of rent charges or charges on income, and the holders of guaranteed, preferred or ordinary stock, no provision is made for binding any outside creditor unless he assents to it, and so where a scheme proposed that outside creditors should receive fully paid up shares in full of their claims which were to be thereby discharged, the Court refused in view of the opposition of some of the outside creditors to approve the scheme and laid down the rule that where a scheme contains a clause seriously affecting the rights of outside creditors, the Court will require the consent in writing of every such outside creditor before it confirms the scheme: *Re Bristol, etc., R.W. Co.*, L.R. 6 Eq. 448; but where such a scheme does not purport to bind outside creditors and its appropriation of the free assets could not be complained of by them as they had no lien upon such assets and the scheme appeared to be honestly framed for the benefit of all parties, the Court would not give effect to the objections of a large unsecured creditor, who not being bound by the scheme is still entitled to look to the assets (if any) of the company after secured creditors have been paid: *Re East & West India Dock Co.*, 44 Ch. D. 38 per Chitty, J., at p. 44, quoting *Stevens v. Mid-Hants R.W. Co.*, L.R. 8 Ch. 1064, 1068; see also *Re Cambrian R.W. Co.'s Scheme*, L.R. 3 Ch. 278. Even though creditors are not bound by a scheme, the Court has not merely permitted them to be heard, but in certain cases has given effect to their objections by declining to sanction the scheme: *Re Bristol, etc., R.W. Co.*, L.R. 6 Eq. 448; *Re Somerset, etc., R.W. Co.*, 18 W.R. 332. As explaining the general principle of this legislation, Cotton, L.J., in *Re East & West India Dock Co.*, *supra*, at p. 65, says: "What we have to consider is, does not this scheme afford a reasonable prospect of providing for the payment of creditors? That is really the principal object of the scheme. If the company say 'we cannot pay our creditors,' then a scheme must be prepared, and it will be binding as between the company and its shareholders and debenture holders, but it is prepared with a view of paying the creditors." The secretary of the company to whom salary is due is no more bound by the scheme than any other outside creditor though he may not have opposed it: *Re Teign Valley R.W. Co.*, 17 W.R. 817. The rights of debenture holders or secured creditors are noted under section 286, *infra*.

Stay of proceedings. Sub-section 2 of section 285 provides for staying actions while a scheme is maturing and though outside creditors may not be ultimately bound by it, yet where honestly framed with a view to protecting all interests the Court will stay an outside creditor's action during the period allowed for perfecting it and obtaining the necessary approval, but it will not do so unless the scheme proposes to make reasonable provision for the payment of such creditors: *Re Cambrian R.W. Co.'s Scheme*, L. R. 3 Ch. 278, and in a proper case such proceedings will be stayed even though the three months allowed by section 287, *infra*, have elapsed and no extension of time has been granted: *Robertson v. Wrexham, Mold, etc., R.W. Co.*, 17 W.R. 137; though in this case such a stay was only granted on terms that the defendants would consent to judgment being entered for the plaintiffs' claim. The power of the Court to stay an action upon a summary application under sub-section 2, *supra*, is gone when the scheme has been enrolled and approved by the Court under section 287, sub-section 4, *infra*; after enrolment the company cannot obtain an injunction either against an outside creditor or one bound by the scheme except by bringing an action therefor: *Re Potteries, etc., R.W. Co.*, L.R. 5 Ch. 67. Sub-section 4, *supra*, also has reference only to the period before enrolment of the scheme, after enrolment leave to issue execution need not be obtained by any one not bound by it: *Re Potteries, etc., R.W. Co., supra*; nor is leave necessary in any case where a scheme has been considered and dismissed: *Re Bristol, etc., R.W. Co.*, 20 L.T.N.S. 70; but while still pending creditors must obtain leave before they can issue execution upon a writ of *sci fa*, against a shareholder for unpaid calls due under his share by virtue of section 108, *supra*: *Re Devon, etc., R.W. Co.*, 6 Eq. 310; and a person holding debentures was forbidden to bring an action upon them during the period of suspense: *London Financial Association v. Wrexham, Mold, etc., R.W. Co.*, 18 Eq. 566.

Assent of
bond-
holders.

286. The scheme shall be deemed to be assented to by the holders of mortgages or bonds issued under the authority of this or any Special Act relating to the company, when it is assented to in writing by three-fourths in value of the holders of such mortgages or bonds, and shall be deemed to be assented

to by the holders of debenture stock of the company when it is assented to in writing by three-fourths in value of the holders of such stock. 1 Edw. VII., c. 31, s. 5, Am.

2. Where any rent charge or other payment is charged on the receipts of, or is payable by, the company in consideration of the purchase of the undertaking of another company, the scheme shall be deemed to be assented to by the holders of such rent charge or other payment when it is assented to in writing by three-fourths in value of such holders. 1 Edw. VII., c. 31, s. 6.

3. The scheme shall be deemed to be assented to by the guaranteed or preference shareholders of the company when it is assented to in writing as follows:—If there is only one class of guaranteed or preference shareholders, then by three-fourths in value of that class; and if there are more classes of guaranteed or preference shareholders than one, then by three-fourths in value of each such class. 1 Edw. VII., c. 31, s. 7.

4. The scheme shall be deemed to be assented to by the ordinary shareholders of the company when it is assented to by a special general meeting of the company specially called for that purpose. 1 Edw. VII., c. 31, s. 8.

5. Where the company is lessee of a railway, the scheme shall be deemed to be assented to by the leasing company when it is assented to as follows:—

(a.) In writing by three-fourths in value of the holders of mortgages, bonds and debenture stock of the leasing company;

(b.) If there is only one class of guaranteed or preference shareholders of the leasing company, then in writing by three-fourths in value of that class, and if there are more classes of guaranteed or preference shareholders in the leasing company than one, then in writing by three-fourths in value of each such class;

(c.) By the ordinary shareholders of the leasing company at a special general meeting of that company specially called for that purpose. 1 Edw. VII., c. 31, s. 9.

When
assent
may be
dispensed
with.

6. The assent to the scheme of any class of holders of mortgages, bonds or debenture stock, or of any class of holders of a rent charge or other payment as aforesaid or of any class of guaranteed or preference shareholders, or of a leasing company, shall not be requisite in case the scheme does not prejudicially affect any right or interest of such class or company. 1 Edw. VII., c. 31, s. 10.

Assent of debenture holders and shareholders. After a scheme has been duly assented to by three-fourths in value of the debenture holders, dissenting debenture holders though entitled to appear and state their objections will be bound by the scheme unless it can be shewn that the approval of the majority was obtained by fraud: *Re East & West, etc., R.W. Co.*, L.R. 8 Eq. 87. The assent of the statutory majority of three-fourths of any class cannot be dispensed with if any existing right of that class is "prejudicially affected" under sub-section 6, *supra*, it being for them and not for the Court to consider whether the scheme gives them such benefits that their rights on the whole are not "prejudicially affected:" *Re Neath, etc., R.W. Co.* (1892), 1 Ch. 349. Though a debenture holder has a judgment for the amount of his debenture and interest, he is still a debenture holder, and cannot claim that he is an outside creditor and not bound by the scheme as not assenting to it: *Potteries, etc., R.W. Co. v. Minor*, L.R. 6 Ch. 621. And where the holder of debentures has turned his security into irredeemable debenture stock he will still be bound by any scheme of arrangement which is binding on the debenture holders: *London Financial Association v. Wrexham, Mold, etc., R.W. Co.*, L.R. 18 Eq. 566. Holders of preferred half-shares do not form a separate class who must separately approve of the scheme under this section: *Re Brighton & Dyke R.W. Co.*, 44 Ch. D. 28; but though preference shareholders are given the same right of voting at meetings as ordinary shareholders, the consent of preference shareholders as a separate class must still be obtained: *Re Cambrian R.W. Co.*, 19 W.R. 871.

287. If, at any time within three months after the filing of the scheme, or within such extended time as the Exchequer Court, from time to time, thinks fit to allow, the directors of the company consider the scheme to be assented to as by this Act required, they may apply to the Exchequer Court by petition in a summary way for confirmation of the scheme. Application for confirmation of scheme.

2. Notice of any such application when intended shall be published in *The Canada Gazette*. 1 Edw. VII., c. 31, s. 11, Am. Notice of application.

3. After hearing the directors, and any creditors, shareholders, or other persons whom the Exchequer Court thinks entitled to be heard on the application, the Court, if satisfied that the scheme has been, within three months after the filing of it, or such extended time, if any, as such Court has allowed, assented to as required by this Act, and that no sufficient objection to the scheme has been established, may confirm the scheme. 1 Edw. VII., c. 31, s. 12, Am. Confirmation by Court.

4. The scheme when confirmed shall be enrolled in the Exchequer Court, and thenceforth it shall be binding and effectual to all intents, and the provisions thereof shall, against and in favour of the company and all persons assenting thereto or bound thereby, have the like effect as if they had been enacted by Parliament. 1 Edw. VII., c. 31, s. 13, Am. Enrolment in Court.

5. Notice of the confirmation and enrolment of the scheme shall be published in *The Canada Gazette*. 1 Edw. VII., c. 31, s. 14. Notice of confirmation and enrolment.

Confirmation and Enrolment. Where a scheme had been confirmed, the enrolment of the confirmation order was stayed on the application of outside creditors who within thirty days from the date of the order had applied for a re-hearing: *Re Devon, etc., R.W. Co.*, 6 Eq. 615. After enrolment, the right to apply by summary application for a stay of a creditor's action, no longer exists; but where the creditor or others are bound by the scheme

an action for a stay and for an injunction in the usual course is proper: *Re Potteries, etc., R.W. Co.*, L.R. 5 Ch. 67, and notes to section 285, *supra*.

Staying proceedings. It was said in *Re Manchester & Milford R.W. Co.*, W.N. 1881, 121, that the Court may amend and alter the scheme, but no such right is expressly given and it was decided in *Re Neath & Brecon R.W. Co.* (1892), 1 Ch. 349, that no order would be made in the absence of consent from three-fourths of every class "prejudicially affected" by any order. Such a rule if it exists must therefore necessarily be subject to modification in this respect. See notes to section 286, *supra*. Where the rules of practice make provision for binding absent parties by published notices or other means, the Court may invoke such rules for the purpose of binding absent debenture holders by a proposed scheme of arrangement: *Saragossa, etc., R.W. Co. v. Collingham* (1904), A.C. 159, reversing *Collingham v. Sloper* (1901), 1 Ch. 769.

Copies
of the
scheme
to be
sold to
the
public.

288. The company shall at all times keep at its principal or head office printed copies of the scheme when confirmed and enrolled and shall sell such copies to all persons desiring to buy them at a reasonable price, not exceeding ten cents for each copy.

Penalty.

2. If the company fails to comply with this provision it shall be liable to a penalty not exceeding one hundred dollars and to a further penalty not exceeding twenty dollars for every day during which such failure continues after the first penalty is incurred. 1 Edw. VII., c. 31, s. 15.

Rules of
practice.

289. The judge of the Exchequer Court may make general rules for the regulation of the practice and procedure of the Court under the last preceding four sections of this Act, which rules shall have force and effect when they are approved by the Governor in Council. 1 Edw. VII., c. 31, s. 16.

PART XIV.

Offences and Penalties.

290. No company shall, either directly or indirectly, employ any of its funds in the purchase of its own stock, or in the acquisition of any shares, bonds or other securities issued by any other railway company in Canada; but this shall not affect the powers or rights which any company in Canada now has or possesses by virtue of any Special Act to acquire, have or hold shares, bonds or other securities, of any railway company in Canada or the United States. 51 V., c. 29, s. 276, Am.

Company not to purchase stock in other companies. Existing rights saved.

2. Every director of a railway company, who knowingly permits the funds of any such company to be applied in violation of this section, shall incur a penalty of one thousand dollars for each such violation, which penalty shall be recoverable on information filed in the name of the Attorney-General of Canada: and a moiety thereof shall belong to His Majesty, and the other moiety thereof shall belong to the informer; and the acquisition of each share, bond or other security, or interest, as aforesaid, shall be deemed a separate violation of the provisions aforesaid. 51 V., c. 29, s. 277.

Penalty upon directors.

Apart from statute, "it is at first sight beyond the power of one trading corporation to become shareholder in another and to apply its funds for that purpose." If, however, it is authorized by its charter or special Act, it may of course do so: *Re Barneds Banking Co.*, L.R. 3 Ch. 105, at p. 112; and a railway company cannot, without express authority, purchase shares in another company: *Salomons v. Laing*, 12 Beav. 339; but, *semble*; where authorized to hold a certain number of shares in another corporation, it may take up new stock issued in respect of the holdings which it is authorized to possess: *Great Western R.W. Co. v. Metropolitan R.W. Co.*, 11 W.R. 481; nor can a railway

company without express authority secure the capital of and guarantee the profit of a connecting steamboat line: *Colman v. Eastern Counties R.W. Co.*, 10 Beav. 1.

The general principle that a company without express power or necessary implication cannot buy shares of another company was discussed and re-affirmed in *Re British, etc., Assn.*, 8 Ch. D. 679.

Walking
on track
pro-
hibited.

291. Every person not connected with the railway, or employed by the company, who walks along the track thereof, except where the same is laid across or along a highway, is liable on summary conviction to a penalty not exceeding ten dollars.

Destruc-
tion of
fences,
bridges,
etc.

2. Every person who wilfully breaks down, injures, weakens or destroys any gate, fence, erection, building or structure of a company, or removes, obliterates, defaces or destroys any printed or written notice, direction, order, by-law or regulation of a company, or any section of, or extract from this Act or any other Act of Parliament, which a company or any of its officers or agents have caused to be posted, attached or affixed to or upon any fence, post, gate, building or erection of the company, or any car upon any railway, shall be liable on summary conviction to a penalty not exceeding fifty dollars, or, in default of payment, to imprisonment for a term not exceeding two months.

Defacing
notices,
etc.

Penalty.

Fraudu-
lently
attempt-
ing to
travel
without
paying
fare.

Obstruct-
ing
railway
authori-
ties.

Trespass-
ing.

Penalties.

3. Every person who enters upon any railway train without the knowledge or consent of an officer or servant of the company with intent fraudulently to be carried upon the said railway without paying fare thereon, or who wilfully obstructs or impedes any officer or agent of the company in the execution of his duty upon any train, railway, or upon any of the premises of the company, or who, not being an employee of the company, wilfully trespasses by entering upon any of the stations, cars, or buildings of the company in order to occupy the same for his own purposes, shall be liable to the like penalty or imprisonment, and shall be liable to be proceeded against and dealt with in like manner, as mentioned in sub-section 2 of this section in regard to the offences therein mentioned.

4. Any person charged with an offence under this section shall be a competent witness on his own behalf. 51 V., c. 29, s. 273, Am.; 62-63 V., c. 37, s. 4. <sup>Wit-
nesses.</sup>

Walking on the Track. Even though a company may have known that its track was habitually used by persons who wished to reach a nearby highway, that was not construed as a license to use it, and a person injured is a trespasser and not entitled to recover for injuries he sustained while so trespassing, even though the company's train in approaching such highway had failed to give the statutory warnings: *Grand Trunk R.W. Co. v. Anderson*, 28 S.C.R. 541, reversing *Anderson v. Grand Trunk R.W. Co.*, 27 O.R. 441, 24 A.R. 672; and see *Jones v. Grand Trunk R.W. Co.*, 16 A.R. 37, 18 S.C.R. 696. But where with the tacit acquiescence of the company the fence which it was required to maintain alongside its tracks had been removed, and a foot-way across its tracks habitually used, it was held that the parents of a child killed at this point might recover, because there was a neglect of duty in permitting the track to remain unfenced at this point: *Tabb v. Grand Trunk R.W. Co.*, 4 Can. Ry. Cas. 1, followed *Potvin v. Canadian Pacific R.W. Co.*, 4 Can. Ry. Cas. 8. In Pennsylvania, under somewhat similar circumstances, a different result has been arrived at: *Baltimore, etc., R.W. Co. v. Schwindling*, 101 Penn. St. 258. In neither the *Tabb* or *Potvin Cases*, *supra*, was section 291 referred to. In *Ullric v. Cleveland, etc., R.W. Co.*, 13 Am. & Eng. Ry. Cas. N.S. 783, at p. 787, it was said that employees in charge of a train are entitled to assume that anyone standing or walking on the track will in due time remove himself from danger, and they are not required to stop or check the speed of the train until they become aware that he is oblivious of his peril. A large number of cases on this point are collected in 13 Am. & Eng. Ry. Cas. N.S., pp. 770 to 825. In a peculiar case, where a person on the track stepped off to avoid a train but was pushed on again by a cow which got on the right of way owing to the neglect of the company's duty to fence, and was injured by the train, he was not allowed to succeed: *Schreiner v. Great Northern R.W. Co.*, 58 L.R.A. 75. Where a person properly in defendants' yards chose to walk between the rails instead of outside of them and was injured, he was precluded by his own contributory negligence from recovering: *Phillips v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 399, following *Callender v. Carleton Iron Co.*, 9 Times L.R. 646, 10 Times L.R. 366.

Destruction of Railway Property. With this section should be read section 489 of the Criminal Code, as follows:—

“Every one is guilty of an indictable offence and liable to five years’ imprisonment who in manner likely to cause danger to valuable property, without endangering life or person:

(a) Places any obstruction upon any railway, or takes up, removes, displaces, breaks, or injures any rail, sleeper, or other matter or thing belonging to any railway; or

(b) shoots or throws anything at an engine or other railway vehicle; or

(c) interferes without authority with the points, signals or other appliances upon any railway; or

(d) makes any false signal on or near any railway; or

(e) wilfully omits to do any act which it is his duty to do; or

(f) does any other unlawful act.”

“2. Every one who does any of the acts above mentioned with intent to cause such danger is liable to imprisonment for life, R.S.C. c. 168, ss. 38 and 39.”

Obstructing Railways. With this compare section 490 of the Criminal Code which enacts that:

“Every one is guilty of an indictable offence and liable to two years imprisonment who, by any act or wilful omission obstructs or interrupts or causes to be obstructed or interrupted, the construction, maintenance or free use of any railway, or any part thereof, or any matter or thing appertaining thereto or connected therewith. R.S.C. c. 168, ss. 38 and 39.”

Board
may
order
foot-
bridges
erected at
level
crossings.

292. If the Board orders any company to erect, at or near, or in lieu of, any highway crossing at rail level, a foot bridge, or foot bridges, over its railway, for the purpose of enabling persons, passing on foot along such highway, to cross the railway by means of such bridge or bridges, from and after the completion of such foot bridge or foot bridges so required to be erected, and while the company keeps the same in good and sufficient repair, such crossing shall not be used by foot passengers on the said highway, except during the time when the same is used for the passage of carriages, carts, horses or cattle along the said road.

Subse-
quent
use of
highway
crossing.

2. Every person who offends against the provisions of this section is liable, on summary conviction to a penalty not exceeding ten dollars. 51 V., c. 29, s. 274, Am. Penalty for non-compliance.

293. Every company which shall erect, operate or maintain any bridge, approach, tunnel, viaduct, trestle, or any building, erection or structure, in violation of this Act, or of any order or regulation of the Board, shall for each offence incur a penalty of fifty dollars. Sub. for 51 V., c. 29, s. 189. Penalty for erection, etc., of structures in violation of this Act.

Compare sections 202 and 203, *ante*.

294. The company, or any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by the company, doing, causing or permitting to be done, any matter, act or thing contrary to the provisions of this or the special Act or to the orders or directions of the Governor in Council, or of the Board, or Minister made hereunder, or omitting to do any matter, act or thing required to be done on the part of any such company, or person, is liable to any person injured thereby for the full amount of damages sustained by such Act or omission; and if no other penalty is in this or the special Act provided for any such act or omission, is liable, for each offence, to a penalty of not less than twenty dollars, and not more than five thousand dollars, in the discretion of the Court before which the same is recoverable. 51 V., c. 29, s. 289, ss. 1, Am. Liability of company directors, etc., in certain cases. Damages. Penalty.

This was discussed in the "General Note on Negligence in Operating Railways," *ante*, part IX.

To Whom the Section Applies. The words "any person injured thereby" were considered in *LeMay v. Canadian Pacific R.W. Co.*, 18 O.R. 314, 17 A.R. 293, and it was held, contrary to some expressions of opinion in *McLauchlin v. Midland R.W. Co.*, 12 O.R. 418, that they included the railway company's employees, but per Osler, J.A., at p. 391, the words should not be construed "in derogation of the common law rule as to the non-liability of the master for

an injury sustained by one servant through the negligence of a fellow servant unless, in the case of a particular act or omission provided against, such extended construction is plainly required." This case was followed in *Curran v. Grand Trunk R.W. Co.*, 25 A.R. 407, at p. 411. In *Plester v. Grand Trunk R.W. Co.*, 1 Can. Ry. Cas. 27, where a person hauling gravel over another's farm crossing had his horse killed it was said, *obiter*, that he would be entitled to damages under this section.

Intoxica-
tion
of con-
ductors
and
drivers

295. Every person who is intoxicated while he is in charge of a locomotive engine, or acting as the conductor of a car or train of cars, is guilty of an indictable offence and liable to ten years' imprisonment. 51 V., c. 29, s. 292.

Selling
liquor to
railway
em-
ployees
on duty.

2. Every person who sells, gives or barter any spirituous or intoxicating liquor to or with any servant or employee of any company, while on duty, is liable on summary conviction to a penalty not exceeding fifty dollars, or to imprisonment with or without hard labour for a period not exceeding one month, or to both. 51 V., c. 29, s. 293.

Viola-
tion by
em-
ployees,
of by-law
etc.,
punish-
able in
certain
cases.

296. Every officer or servant of, and every person employed by the company, who wilfully or negligently violates any by-law, rule or regulation of the company or its directors lawfully made and in force, or any order or notice of the Board, or of the Minister or of an inspecting engineer, of which a copy has been delivered to him, or which has been posted up or open to his inspection in some place where his work or his duties, or any of them, are to be performed, if such violation causes injury to any person or to any property, or exposes any person or any property to the risk of such injury, or renders such risk greater than it would have been without such violation, although no actual injury occurs, is guilty of an offence, and shall, in the discretion of the court before which the conviction is had, and according as such court considers the offence proved to be more or less grave, or the injury or risk of injury to person or property to be more or less great, be punished by fine or imprison-

Penalty.

ment, or both; but no such fine shall exceed four hundred dollars, and no such imprisonment shall exceed the term of five years. 51 V., c. 29, s. 294, Am.

2. The company may, in all cases under this section, pay the amount of the penalty and costs, and recover the same from the offender or deduct it from his salary or pay. 51 V., c. 29, s. 295. Recovery of penalty from employees.

See notes to section 243, *et seq.*

297. Every person who wilfully or negligently violates any by-law, rule, or regulation of the company is liable, on summary conviction, for each offence, to a penalty not exceeding the amount therein prescribed, or if no amount is so prescribed, to a penalty not exceeding twenty dollars; but no such person shall be convicted of any such offence, unless at the time of the commission thereof a printed copy of such by-law, rule or regulation was openly affixed to a conspicuous part of the station at which the offender entered the train or at or near which the offence was committed. 51 V., c. 29, s. 296. Violation of by-laws, etc., by other persons. Penalty. Proviso as to posting by-law, etc.

See notes to section 243, *et seq.*

298. Every person who—

(a.) bores, pierces, cuts, opens or otherwise injures any cask, box or package, which contains wine, spirits or other liquors, or any case, box, sack, wrapper, package or roll of goods, in, on or about any car, waggon, boat, vessel, warehouse, station house, wharf, quay or premises of, or which belong to any company, with intent feloniously to steal or otherwise unlawfully to obtain or to injure the contents, or any part thereof, or,— Damaging freight with intent to steal contents.

(b.) unlawfully drinks or wilfully spills or allows to run to waste any such liquors, or any part thereof,— Drinking or wasting liquor.
is liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the goods or liquors

Penalties so taken or destroyed, or to imprisonment, with or without hard labour, for a term not exceeding one month, or to both. 51 V., c. 29, s. 297.

With this compare section 491 of the Criminal Code, which is as follows:

“Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the goods or liquors so destroyed or damaged or to one month’s imprisonment with or without hard labour, or to both, who

(a.) wilfully destroys or damages anything containing any goods or liquors in or about any railway station or building, or any vehicle of any kind on any railway, or in any warehouse, ship or vessel, with intent to steal or otherwise unlawfully to obtain or to injure the contents, or any part thereof; or

(b.) unlawfully drinks or wilfully spills or allows to run to waste any such liquors or any part thereof. R.S.C. c. 38, s. 62; 51 V., c. 29, s. 297.”

Each day’s violation of this Act, or order hereunder, a distinct offence.

299. When the violation of, or failure to comply with, any provisions of this Act, or any regulation or order or direction of the Board, or the Minister, or the Governor in Council, or of any inspecting engineer, is made an offence subject to penalty, by this Act, or by any regulation made under this Act, each day’s continuance of such violation, or failure, to comply, shall constitute a new and distinct offence.

Act or omission of officer, etc., deemed to be act or omission of company. Certain penalties may be imposed on summary convictions.

2. For the purpose of enforcing any penalty under any of the provisions of this Act, or enforcing any regulation, order, or direction of the Board, the Minister, or the Governor in Council, or any inspecting engineer, made under this Act, the act, omission, or failure of any officer, agent, or other person acting for, or employed by the company acting within the scope of his employment shall in every case be also deemed to be the act, omission or failure of such company as well as that of the person; and anything done or omitted to be done by the company which, if done or omitted to be done by any director, or officer there-

of, or any receiver, trustee, lessee, agent, or person acting for or employed by the company, would constitute an offence under this Act, shall also be held to be an offence committed by such company, and upon conviction thereof the company shall be subject to the like penalties as are prescribed by this Act with reference to such persons. (New).

300. Where any penalty, prescribed for any offence under this Act, is one hundred dollars or less, with or without imprisonment, the penalty may, subject to the provisions of this Act, be imposed and recovered on summary conviction before a justice of the peace; and where the penalty prescribed is more than one hundred dollars and less than five hundred dollars, the penalty may, subject, as aforesaid, be imposed and recovered on summary conviction before two or more justices, or before a police magistrate, a stipendiary magistrate or any person with the power or authority of two or more justices of the peace.

2. Whenever the Board shall have reasonable ground for belief that the company, or any person or corporation is violating or has violated any of the provisions of this Act in respect of which violation a penalty may be imposed under this Act, the Board may request the Attorney General for Canada to institute and prosecute proceedings on behalf of His Majesty the King against such company or person for the imposition and recovery of the penalty provided under this Act for such violation, or the Board may cause an information to be filed in the name of the Attorney General for Canada for the imposition and recovery of such penalty.

3. No prosecution shall be had against the company for any penalty under this Act in which the company might be held liable for a penalty exceeding one hundred dollars, without the leave of the Board being first obtained. (New).

301. Where the company has been convicted of any penalty under this Act, such penalty shall be the first lien or charge upon the railway, property, assets, rents and revenues of the company.

PART XV.

Statistics and Returns.

Interpre-
tation.

“Com-
pany.”

302. In the following sections of this Act down to section three hundred and eight inclusive, unless the context otherwise requires, the expression “company” means a company constructing or operating a line of railway in Canada, whether otherwise within the legislative authority of the Parliament of Canada or not, and includes any individual or individuals not incorporated, who are owners or lessees of a railway in Canada, or parties to an agreement for working a railway in Canada. 51 V., c. 29, s. 298.

It will be noted that this has reference to any company operating or constructing a line in Canada. It would not apply to a company which merely had a canvassing and advertising agent: *Bertin v. Northern Pacific R.W. Co.*, Q.R. 9 S.C. 321; a decision under the Quebec Revised Statutes, sections 4754 and 4757.

Annual
returns
to be
prepared.

303. Every company shall annually prepare returns in accordance with the forms contained in schedule one to this Act, of its capital, traffic and working expenditure, and of all information required, as indicated in the said form, to be furnished to the Minister; and such returns shall be dated and signed by, and attested upon the oath of the secretary, or some other chief officer of the company, and of the president, or in his absence, of the vice-president or manager of the company.

Form and
attesta-
tion.

Period
included.

2. Such returns shall be made for the period included from the date to which the then last yearly returns made by the company extended, or from the commencement of the operation of the railway, if no such returns have been previously made, and, in either case, down to the last day of June, in the then current year.

3. A duplicate copy of such returns, dated, signed and attested in manner aforesaid, shall be forwarded by such company to the Minister within three months after the first day of July in each year. Duplicate for Minister.

4. The company shall also, in addition to the information required to be furnished to the Minister, as indicated in the said schedule one, furnish such other information and returns as are, from time to time, required by the Minister. Other returns when required.

5. Every company which makes default in forwarding such returns in accordance with the provisions of this section, shall incur a penalty not exceeding ten dollars for every day during which such default continues. Penalty for non-compliance.

6. The Minister shall lay before both Houses of Parliament, within twenty-one days from the commencement of each session thereof, the returns made and forwarded to him in pursuance of this section. 51 V., c. 29, s. 299. Returns to be submitted to Parliament.

The duplicate copy of the returns required by sub-section 3, *supra*, must be an exact copy and where in one of the company's lists a shareholder's name was inadvertently omitted it was held that the lists were not duplicates and that the company was liable to a penalty under the Act requiring such lists: *Towner v. Hiawatha, etc., Co.*, 30 O.R. 547.

304. Every company shall, weekly, prepare returns of its traffic, that is to say, from the first to the seventh of the month inclusive, from the eighth to the fourteenth inclusive, from the fifteenth to the twenty-first inclusive, and from the twenty-second to the close of the month, inclusive, and such returns shall be in accordance with the form contained in schedule two to this Act, and a copy of such returns, signed by the officer of the company responsible for the correctness of such returns, shall be forwarded by the company to the Minister, within seven days from the day to which the said returns have been prepared. The Minister may in any case extend the time within which such returns shall be forwarded. Weekly returns of traffic.

Penalty. 2. Every company which makes default in forwarding the weekly returns to the Minister, shall incur a penalty not exceeding ten dollars for every day during which such default continues. 51 V., c. 29, s. 300, Am.

Making false returns a misdemeanour. 3. Every person who, knowing the same to be false in any particular, signs any return required by this or the next preceding section, is guilty of an offence punishable on summary conviction. 51 V., c. 29, s. 301, Am.

Semi-annual returns of accidents. 305. Every company shall, within one month after the first days of January and July, in each and every year, make to the Minister, under the oath of the president, secretary or superintendent of the company, a true and particular return of all accidents and casualties, whether to life or property, which have occurred on the railway of the company during the half year next preceding each of the said periods respectively, setting forth—

- Causes and nature. Locality and time. Extent and particulars. (a.) the causes and natures of such accidents and casualties;
- (b.) the points at which they occurred, and whether by night or by day;
- (c.) the full extent thereof, and all the particulars of the same;

Copies of by-laws. And shall also, when required by the Minister, return a true copy of the existing by-laws of the company, and of its rules and regulations for the management of the company and of its railway. 51 V., c. 29, s. 302, Am.

Compare sections 235 and 236, *ante*.

Minister may prescribe form of returns. 306. The Minister may order and direct, from time to time, the form in which such returns shall be made up, and may order, and direct any company to make up and deliver to the Minister, from time to time in addition to the said periodical

returns, returns of serious accidents occurring in the course of the public traffic upon the railway belonging to such company, whether attended with personal injury or not, in such form and manner as the Minister deems necessary and requires for his information with a view to public safety. 51 V., c. 29, s. 303.

307. If the returns required under the two sections next preceding, so verified, are not delivered within the respective times in the said sections prescribed, or within fourteen days after the same have been so required by the Minister, every company which makes default in so doing shall forfeit to His Majesty the sum of one hundred dollars for every day during which the company neglects to deliver the same. 51 V., c. 29, s. 304.

308. All returns made in pursuance of any of the provisions of the six sections of this Act next preceding shall be privileged communications, and shall not be evidence in any court whatsoever, except in any prosecution under sub-section three of section three hundred and four, or for perjury in making the said oath or for forgery of said return or any part thereof. 51 V., c. 29, s. 305, Am.

By section 235, *ante*, reports of accidents must be given to the Board immediately on their occurrence and the Board may declare such reports to be privileged, but unless so declared, the statute does not treat them as such. By section 308, returns made under this and the preceding six sections are declared to be privileged absolutely, except in the cases specified. Where in an accident report not otherwise privileged the names of persons who will be witnesses for the company are given, that part of the report is privileged: *Armstrong v. Toronto R.W. Co.*, 15 P.R. 208, and where reports of officers of a railway company of an accident are in good faith prepared for the purpose of being communicated to the company's solicitor with the object of obtaining his advice thereon and enabling him to defend an action they are to be treated as privileged: *Hunter*

v. *Grand Trunk R.W. Co.*, 16 P.R. 385, and where no litigation is actually under way; but it is reasonably anticipated, such reports may be privileged: *London Life v. Molsons Bank*, 1 O. W.R. 457.

Returns to Board of assets and liabilities. **309.** The Board may from time to time, by notice served upon the company, or any officer, servant or agent of the company, require it, or such officer, servant or agent to furnish the Board, at or within any time stated in such notice, a written statement or statements showing in so far, and with such detail and particulars, as the Board requires, the assets and liabilities of the company—the amount of its stock issued and outstanding—the date at which any such stock was so issued—the amount and nature of the consideration received by the company for such issue, and, in case the whole of such consideration was not paid to the company in cash, the nature of the service rendered to or property received by the company for which any stock was issued—the gross earnings or receipts or expenditure by the company during any periods specified by the Board, and the purposes for which such expenditure was made—the amount and nature of any bonus, gift, or subsidy, received by the company from any source whatsoever, and the source from which and the time when, and the circumstances under which, the same was so received or given—the bonds issued at any time by the company, and what portion of the same are outstanding and what portion, if any, have been redeemed,—the amount and nature of the consideration received by the company for the issue of such bonds—the character and extent of any liabilities outstanding, chargeable upon the property or undertaking of the company or any part thereof, and the consideration received by the company for any such liabilities and the circumstances under which the same were created—the cost of construction of the company's railway or of any part thereof,—the amount and nature of the consideration paid or given by the company for any property acquired by it,—the particulars of any lease, con-

Of stock issued and outstanding, etc.

Of earnings and expenditure.

Of bonuses.

Of bonds.

Of secured liabilities.

Of cost of property.

Of cost of acquisitions.

tract or arrangement entered into between the company and any other company or person,—and generally, the extent, nature, value and particulars of the property, earnings, and business of the company.

Of leases and contracts. Generally.

2. The Board may summon, require the attendance of, and examine under oath, any officer, servant or agent of the company, or any other person, as to any matters included in such return, or which were required by notice aforesaid to be returned to the Board, and as to any matter or thing which, in the opinion of the Board is relevant to such return or to any inquiry which the Board deems it expedient to make in connection with any of the matters in this section aforesaid; and for such purposes may require the production to the Board of any books or documents in control of the company, or such officer, servant, agent or person.

Powers of Board respecting returns.

Or inquiries respecting same.

Production of documents.

3. If any company, or officer, servant, or agent thereof wilfully or negligently refuses to make such return when, and as thereunto, required by the Board, or fails to make any such return to the utmost of its, or his, knowledge or means of knowledge, the company, and every such officer, servant or agent, so in default, shall severally be liable, on conviction, to a penalty not exceeding one thousand dollars, and in addition, each such officer, servant or agent, so convicted shall be liable to imprisonment in the common gaol of the county in which such conviction is made, for any period not exceeding twelve months.

Refusal to make returns.

Penalties

4. If the company, or any officer, servant, or agent thereof, wilfully or negligently makes any false return, or any false statement in any such return, the company, and any such officer, servant or agent, shall be severally liable on conviction to a penalty not exceeding one thousand dollars, and such officer, servant or agent shall be severally liable on conviction to a penalty not exceeding one thousand dollars, and such officer, servant or agent shall also on such conviction,

Making false returns to Board.

be liable to imprisonment for any period not exceeding twelve months, in the common jail of the county where such conviction is had.

Information
privi-
leged.

Penalty
for em-
ployees
of Board
divulging.

5. Any information furnished to the Board by any such return, or any evidence taken by the Board in connection therewith, shall not be open to the public, or published, but shall be for the information of the Board only; and if any official or servant of the Board, or any person having access to or knowledge of, any such return or evidence shall, without the authority of the Board first obtained, publish or make known any information, having obtained the same, or knowing the same to have been derived, from such return or evidence, he shall be liable, on conviction, to a penalty not exceeding five hundred dollars for each offence, and to imprisonment not exceeding six months in the common jail in the county where such conviction is had.

Governor
in Coun-
cil
may
examine
returns,
etc.

6. The Governor in Council may, nevertheless, require the Board to communicate to him in Council any or all information obtained by it in manner aforesaid.

Board
may
make
informa-
tion
public,
on notice
to com-
pany, etc.

7. The Board may authorize any part of such information to be made public when, and in so far as there may appear to the Board to be good and sufficient reasons for so doing; but if the information so proposed to be made public by the Board, is of such character that the company would, in the opinion of the Board, be likely to object to the publication thereof, the Board shall not authorize such information to be published without notice to the company and hearing any objection which the company may make to such publication.

PART XVI.

REPEAL AND COMING INTO FORCE OF ACT.

310. The following Acts of the Parliament of Canada are Repealed
hereby repealed:— Acts.

- Chapter 29 of 51 Victoria;—the whole.
- Chapter 28 of 53 Victoria;—the whole.
- Chapter 51 of 54-55 Victoria;—the whole.
- Chapter 27 of 55-56 Victoria;—the whole.
- Chapter 27 of 56 Victoria;—the whole.
- Chapter 53 of 57-58 Victoria;—the whole.
- Chapter 9 of 59 Victoria;—the whole except section 2.
- Chapter 22 of 61 Victoria;—the whole.
- Chapter 37 of 62-63 Victoria;—the whole.
- Chapter 23 of 63-64 Victoria;—the whole.
- Chapter 31 of 1 Edward VII.;—the whole.
- Chapter 32 of 1 Edward VII.;—the whole.

311. This Act shall come into force on a day to be named Date
by proclamation of the Governor General, and notice thereof when
shall be published in *The Canada Gazette*. But, in order to Act
allow time for the companies to comply with this Act in re- comes
spect of tolls, tolls may be charged under the law as it stood into
immediately before the coming into force of this Act, until force.
three months after this Act comes into force, or until such later Tolls
date as the Board may by order in any case, or by regulation, not
fix and allow. affected
until
three
months
later.

The Act was proclaimed on January 18th, 1904, in *The Canada Gazette*, and came into force on February 1st, 1904.

PART XVII. SCHEDULE ONE.

.....Railway Company.
RETURN for the year ending June 30, 19 , required by the
Minister of Railways and Canals, shewing the conditions of
the Capital and Revenue Accounts, etc., etc., of the Railways
in the Dominion of Canada.

No. 1.—LOCATION AND GENERAL DESCRIPTION OF RAILWAY,
*Shewing the county or counties through which the railway runs,
the terminal points, connections, if any, and giving a general
description of the line and the country through which it
passes.*

June 30, 19 .

No. 2.—OFFICIAL NAME AND ADDRESS OF THE COMPANY AND
OFFICIAL SEAL.

No. 3.—NAMES AND RESIDENCES OF DIRECTORS AND OFFICERS
OF THE COMPANY, JUNE 30, 19 .

Names of Directors.	Residences.

President,
Vice-President,
Secretary,
Treasurer,

General Manager,
Engineers,
Superintendents.

No. 4.—LIST of all Statutes, Dominion or Provincial, in any
manner affecting the railways or any part thereof, from the
date of first construction to June 30, 19 .

No. 5.—LIST of all Statutes, Dominion or Provincial, under
which any subsidy, loan or bonus, has been paid or voted,
in respect of the railway, or any part thereof, passed prior
to June 30, 19 .

No. 6.—LIST OF ALL CONTRACTS MADE BY THE COMPANY, for
the construction of any part of the Railway up to June
30, 19 .

Date.	Contractors.	Description of Work.	Location and Mileage.	Prices.

Copies of any contracts must be furnished by the Company to the Minister when required.

No. 7.—CAPITAL ACCOUNT TO JUNE 30, 19 .

	Amount Author- ized.	Amount Share Capital Sub- scribed. Bonds Issued.	Amount Share Capital Paidup. Bonds Sold.	*Rate of Interest or Dividend
	\$ cts.	\$ cts.	\$ cts.	
Total amount of ordinary share capital . . .				
“ of preference share capital . .				
“ “ “ . .				
“ “ “ . .				
“ of ordinary bonds				
“ “ “				
“ “ “				
“ “ “				
“ of Government loans				
“ “ bonuses				
“ “ subscription				
“ “ to shares.				
“ “ subscription				
“ “ to bonds.				
“ of municipal loans				
“ “ bonuses				
“ “ subscription to				
“ “ shares				
“ “ subscription to				
“ “ bonds				
“ of capital from other sources				
Total capital				

*State whether dividend is cumulative or not.

This statement must agree with the totals shewn in the Annual Accounts or Statements from the Directors to the Company, prepared under section 84 of *The Railway Act*, 1903, a copy of which must be transmitted with this return.

If there is more than one issue of preference shares or bonds, state them and the amount of each class.

No. 8.—LOANS OR BONUSES FROM GOVERNMENTS OR MUNICIPALITIES, UP TO JUNE 30, 19 .

From what Source.	Amount of Loan Granted.	Amount of Bonus Granted.	Amount of Sub- scription to shares.	Amount of Sub- scription to Bonds.	Rate of Interest.	Date of Repay- ment.
	\$ cts.	\$ cts.	\$ cts.	\$ cts.	\$ cts.	\$ cts.
Governments.....						
Total						
Municipalities.....						
Total.....						

No. 9.—BONDS OR OTHER SECURITIES NEGOTIATED BY THE
COMPANY, UP TO JUNE 30, 19 .

Amounts.	Rate of Interest.	Date of Sale.	Prices Realized.
\$ cts.	\$ cts.	\$ cts.	\$ cts.

No. 10.—SALES OF LAND MADE BY THE COMPANY, UP TO
JUNE 30, 19 .

Acres Sold.	Price per Acre.	Amount.
	\$ cts.	\$ cts.

No. 11.—FLOATING DEBT, YEAR ENDING JUNE 30, 19 .

Total Amount.	Rate of Interest.	Remarks.
\$ cts.	\$ cts.	

Note.—The floating debt includes all debts other than the bonded debts.

No. 12.—CHARACTERISTICS OF ROAD, ETC., JUNE 30, 19 .

OWNED.		Miles.
*Length of main line from.....to.....		
† “ branch	to	
“ “	to	
“ “	to	
“ “	to	
LEASED.		
Length of branch railway from.....to		
“ “ “	to	
“ “ “	to	
“ “ “	to	
Total mileage worked.....		
Length of road laid with iron rails.....		
“ “ steel rails		
“ of sidings.....		
“ of double track (if any).....		
Weight of rail per yard, main line, iron.....		L
“ “ steel		
“ “ branches, iron.....		
“ “ steel		

No. 12.— CHARACTERISTICS OF ROAD, ETC., JUNE 30, 19 —*Con.*

	Miles.
Number of car sheds and shops	
“ of engine-houses.....	
“ of engines, steam or motor, owned by the Company.	
“ “ hired.....	
“ of power houses..owned..; hired.. { with steam power....	
“ of sleeping cars owned by the Company { with water power....	
“ “ hired.....	
“ “ No. with air brakes.....owned...hired...	
“ “ “ automatic couplers..owned..hired..	
“ of parlour cars owned by the Company.....	
“ “ hired “	
“ “ No. with air brakes....owned...hired....	
“ “ “ automatic couplers..owned..hired..	
“ of dining cars owned by the Company.....	
“ “ hired “	
“ “ with air brakes.....owned.....hired.....	
“ “ with automatic couplers...owned...hired...	
“ of official cars owned by the Company.....	
“ “ hired “	
“ “ with air brakes.....owned.....hired.....	
“ “ with automatic couplers...owned...hired...	
“ of first-class passenger cars owned by Company.....	
“ “ “ hired.....	
“ “ “ with air brakes..owned..hired..	
“ “ “ with auto. couplers “ “ “	
“ of second-class and immigrant cars owned by Company	
“ “ “ hired	
“ “ “ with air brakes..owned..hired	
“ “ “ with auto. couplers “ “ “	
“ baggage, mail and express cars owned by Company.. ...	
“ “ “ hired.....	
Number of baggage, mail and express cars with air brakes....	
owned.....hired	
“ of baggage, mail and express cars with auto. couplers.....	
owned.....hired.....	
“ of cattle and box freight cars owned by Company.....	
“ “ “ hired ..	
“ “ “ with air brakes..owned..hired	
“ “ “ with auto. couplers “ “ “	
“ of refrigerator cars owned by the Company.....	
“ “ “ hired	
“ “ “ with air brakes....owned...hired....	
“ “ “ with auto. couplers. “ “ “	
“ of platform cars owned by the Company.....	
“ “ “ hired.....	
“ “ “ with air brakes.....owned.....hired.....	
“ “ “ with auto. couplers. “ “ “	
“ of coal cars owned by Company.....	
“ “ “ hired.....	
“ “ “ with air brakes.....ownedhired.. ..	
“ “ “ with auto. couplers... “ “ “	

No. 12.—CHARACTERISTICS OF ROAD, ETC., JUNE 30, 19 —*Con*

	Miles.
Number of conductors' vans	
“ “ with air brakes.....owned.....hired....	
“ “ with auto. couplers. “ “	
“ of tool cars	
“ “ with air brakes.....owned.....hired....	
“ “ with automatic couplers “ “	
“ of snow-ploughs and sweepers	
“ of flangers	
“ of other rolling stock.....	
“ of ties to mile, main line.....	
“ “ branches.....	
Nature of fastenings used to secure joint of rail.....	
Number of grain elevators.....	
†Capacity of “ at.....	
“ “	
“ “	
Number of highway crossings at rail-level at which watchmen are employed	
“ of highway crossings at rail-level without watchmen.....	
“ of overhead bridges carrying highway over railway	
“ “ “ farm crossings over railway..	
Height of overhead bridges above rail-level.....	
Number of highway crossings under railway.....	
“ of farm crossings under railway.....	
“ of level crossings of other railways.....	
“ of junctions with other railways	
“ “ branch lines.....	
Radius of sharpest curve.....	
Number of feet per mile of heaviest gradient.....	
Gauge of railway.....	

Mileage in Provinces.	Miles Completed. (Rails laid)	Miles in Operation.
Ontario		
Quebec		
New Brunswick		
Nova Scotia.....		
Prince Edward Island.....		
Manitoba.....		
British Columbia.....		
North-West Territories.....		
Total.....		

*If the line, or any portion of it, is under construction, the length being constructed to be given.

†The length of the main line is the distance from point to point, irrespective of double track or sidings.

‡State where these are situated, and the capacity of each.

NO. 13.—ACTUAL COST OF RAILWAY AND ROLLING STOCK, UP TO
JUNE 30, 19 .

	\$	cts.
1. Cost of land and land damages.....		
2. Cost in connection with the administration of Land Grant in aid, if any.....		
3. Cost of grading, masonry and bridging, station buildings, &c.....		
4. Cost of rolling stock of all kinds, including workshops.....		
Total.....		

The above total to shew the actual cash cost of construction and of rolling stock.

NO. 14.—OPERATIONS OF THE YEAR ENDING JUNE 30, 19 , AND
NUMBER OF MILES RUN.

1. Miles run by passenger trains.....	
2. " freight trains.....	
3. " mixed trains.....	
4. Total miles run by trains.....	
5. " engines.....	
6. Total number of passengers carried.....	
7. " tons of freight (of 2,000 lbs.) carried.....	
8. Average rate of speed of passenger trains.....	
9. " freight trains.....	
10. Average weight of passenger trains in motion.....	
11. " freight trains in motion.....	

Note.—A train consists of one or more cars.

NO. 15.—DESCRIPTION OF FREIGHT CARRIED DURING THE YEAR
ENDING JUNE 30, 19 .

	Weight in Tons.
1. Flour in barrels, No.....	
2. Grain in bushels, No.....	
3. Live stock, No.....	
4. Lumber of all kinds, ft. B.M.....	
5. Coal and other fuel.....	
6. Manufactured goods.....	
7. All other articles.....	
Total weight carried.....	

No. 16.—EARNINGS OF RAILWAY FOR YEAR ENDING
JUNE 30, 19 .

—	\$ cts.
1. From passenger traffic.....	
2. “ freight traffic.....	
3. “ mails and express freight.....	
4. “ other sources	
Total	

No. 17.—OPERATING EXPENSES—MAINTENANCE OF WAY,
BUILDINGS, ETC., FOR THE YEAR ENDING JUNE 30, 19 .

—	\$ cts.
1. Wages, etc., of labour employed on track, including sidings..	
2. Cost of rails and fastenings.....	
3. Ballasting.....	
4. Repairs of bridges and culverts.....	
5. “ and renewals of buildings.....	
6. “ of fencing.....	
7. Clearing snow	
8. Engineering superintendence.....	
Total....	

No. 18.— OPERATING EXPENSES—COST OF MOTIVE POWER FOR
THE YEAR ENDING JUNE 30, 19 .

—	\$ cts.
1. Wages of engineers, motormen, firemen and cleaners.	
2. Fuel.....	
3. Repairs of engines and tenders	
4. Oil, tallow, waste, etc., for engines.....	
5. Pumping engines... ..	
6. Repairs of tools and machinery....	
7. Superintendence.....	
Total	

**No. 19.—OPERATING EXPENSES—MAINTENANCE OF CARS FOR
THE YEAR ENDING JUNE 30, 19 .**

	\$	cts.
1. Wages and material for repairs of passenger cars.....		
2. " " freight cars and snow ploughs		
3. " " other rolling stock		
4. Superintendence.....		
Total.....		

**No. 20.—OPERATING EXPENSES—GENERAL AND OPERATING
CHARGES FOR THE YEAR ENDING JUNE 30, 19 .**

	\$	cts.
1. Office expenses, including directors, auditors, management, travelling expenses, stationery, etc.....		
2. Station agents, clerks, porters, etc.....		
3. Conductors, baggagemen and brakemen.....		
4. Compensation for personal injuries.....		
5. Loss or damage to freight		
6. Cattle killed.....		
7. Ferries and ferry-boats.....		
8. Foreign agencies.....		
9. Small stores, including lights, lamps and signals.....		
10. All other charges.....		
11.		
12.		
13.		
Total.....		

**No. 21.—SUMMARY OF OPERATING EXPENSES FOR THE YEAR
ENDING JUNE 30, 19 .**

	\$	cts.
A. Maintenance of way, buildings, etc.....		
B. Motive power.....		
C. Maintenance of cars....		
D. General and operating expenses.....		
Total cost of operating railway.....		
Operating expenses per train mile....		

The above statement to include the full cost of operating the railway, and the total to correspond with the annual accounts or statements prepared under Sec. 84.

No. 22.—ACCIDENTS DURING THE YEAR ENDING
JUNE 30, 19 .

Cause of Accident.	PASSENGERS		EMPLOYEES		OTHERS		TOTAL.	
	Killed.	Injured.	Killed.	Injured.	Killed.	Injured.	Killed.	Injured.
1. Fell from cars or engines.								
2. Jumping on or off trains or engines when in motion.....								
3. At work on or near the track, making up trains								
4. Putting arms or heads out of windows.....								
5. Coupling cars.....								
6. Collisions, or by trains thrown from track....								
7. Struck by engine or cars on highway crossing..								
8. Walking, standing, lying, sitting or being on track								
9. Explosions.....								
10. Striking bridges.....								
11. Other causes								
Total.....								

No. 23.—DETAILS OF ACCIDENTS DURING THE YEAR ENDING
JUNE 30, 19 .

Date.	Name, Address and Occupation of Persons.	Place of Accident.	Cause.	Nature and extent of Injury.

Passengers and employees to be entered separately.

PART XVIII.

RULES OF PRACTICE AND FORMS

Passed pursuant to section 40 Railway Act, 1903, by the Board
of Railway Commissioners.

(Meeting at Ottawa.)

TUESDAY, the 18th day of October, A.D. 1904.

The Board, in virtue of the provisions of The Railway Act, 1903, hereby makes the following Rules and Regulations:—

PUBLIC SESSIONS.

1. The general sessions of the Board for hearing contested cases will be held at its Court Room in Ottawa, Ontario, on such dates and at such hour as the Board may designate.

When special sessions are held at other places, such announcements as may be necessary will be made by the Board.

INTERPRETATION.

2. In the construction of these rules, and the forms herein referred to, words importing the singular number shall include the plural, and words importing the plural number shall include the singular number; and the following terms shall (if not inconsistent with the context or subject) have the respective meanings hereinafter assigned to them: that it to say, "Application" shall include complaint under this Act; "Respondent" shall mean the person or company who is called upon to answer to any application or complaint; "Affidavit" shall include affirmation; and "Costs" shall include fees, counsel fees, and expenses.

APPLICATION OR COMPLAINT.

3. Every proceeding before the Board under this Act shall be commenced by an application made to it, which shall be in writing and signed by the applicant or his solicitor; or in the case of a corporate body or company being the applicants, shall be signed by their manager, secretary, or solicitor. It shall

contain a clear and concise statement of the facts, the grounds of application, the section of the Act under which the same is made, and the nature of the order applied for, or the relief or remedy to which the applicant claims to be entitled. It shall be divided into paragraphs, each of which, as nearly as possible, shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively. It shall be endorsed with the name and address of the applicant, or if there be a solicitor acting for him in the matter, with the name and address of such solicitor. The application shall be according to the forms in schedule No. 1.

The application, so written and signed as aforesaid, shall be left with or mailed to the Secretary of the Board, together with a copy of any document, or copies of any maps, plans, profiles, and books of reference, as required under the provisions of the Act, (a) referred to therein, or which may be useful in explaining or supporting the same. The Secretary shall number such applications according to the order in which they are received by him and make a list thereof. From the said list there shall be made up a docket of cases for hearing which, as well as their order of entry on the docket, shall be settled by the Board. Said docket list when completed to be put upon a notice board provided for that purpose, which shall be open for inspection at the offices of the Secretary during office hours.

ANSWER.

4. Within ten days from the service of the application, the respondent or respondents shall mail or deliver to the applicant, or his solicitor, a written statement containing in a clear and concise form their answer to the application, and shall also leave or mail a copy thereof with or to the Secretary of the Board at its office, together with any documents that may be useful in explaining or supporting it. The answer may admit the whole or any part of the facts in the application. It shall be divided into paragraphs, which shall be numbered consecutively, and it shall be signed by the person making the same or his solicitor. It shall be endorsed with the name and

(a) For further particulars of plans, etc., see regulations in appendix.

address of the respondents, or if there be a solicitor acting for them in the matter, with the name and address of such solicitor. It shall be according to the form in Schedule No. 2.

REPLY.

5. Within four days from the delivery of the answer to the application, the applicant shall mail or deliver a reply thereto to the respondents, and a copy thereof to the Secretary of the Board, and may object to the said answer as being insufficient, stating the grounds of such objection, or deny the facts stated therein, or may admit the whole or any part of said facts. The reply shall be signed by the applicant or his solicitor, and may be according to form No. 3 in the said schedule.

The Board may, at any time, require the whole or any part of the application, answer or reply, to be verified by affidavit, upon giving a notice to that effect to the party from whom the affidavit is required; and if such notice be not complied with the application, answer, or reply may be set aside, or such part of it as is not verified according to the notice may be struck out.

SUSPENSION OF PROCEEDINGS.

6. The Board may require further information, or particulars, or documents from the parties, and may suspend all formal proceedings until satisfied in this respect.

If the Board, at any stage of the proceedings, think fit to direct inquiries to be made under any of the provisions of this Act, it shall give notice thereof to the parties interested, and may stay proceedings or any part of the proceedings thereon accordingly.

NOTICE.

7. In all proceedings under this Act, where notice is required, a copy or copies of said proceeding, or proceedings, for the purpose of service, shall be endorsed with notice to the parties in the forms of endorsement set forth in schedules Nos. 1 and 2; and in default of appearance the Board may hear and determine the application *ex parte*.

Endorsements shall be signed in accordance with the provisions of Section 28.

The Board may enlarge or abridge the periods for putting in the answer or reply, and for hearing the application, and in that case the period shall be endorsed in the notice accordingly.

Except in any case where it is otherwise provided, ten days' notice of any application to the Board, or of any hearing by the Board, shall be sufficient; unless, in any case, the Board directs longer notice. The Board may, in any case, allow notice for any period less than ten days, which shall be sufficient notice as if given for ten days or longer. (Section 31.)

Notice may be given or served as provided by Section 28 of the Act.

When the Board is authorized to hear an application or make an order, upon notice to the parties interested, it may, upon the ground of urgency, or for other reason appearing to the Board to be sufficient, notwithstanding any want of or insufficiency in such notice, make the like order or decision in the matter as if due notice had been given to all parties; and such order or decision shall be as valid and take effect in all respects as if made on due notice; but any person entitled to notice, and not sufficiently notified may, at any time within ten days after becoming aware of such order or decision, or within such further time as the Board may allow, apply to the Board to vary, amend, or rescind such order or decision; and the Board shall thereupon, on such notice to all parties interested as it may in its discretion think desirable, hear such application, and either amend, alter, or rescind such order or decision, or dismiss the application, as may seem to it just and right. (Section 32.)

CONSENT CASES.

8. In all cases the parties may, by consent in writing, with the approval of the Board, dispense with the form of proceedings herein mentioned, or some portion thereof.

POWER TO DIRECT AND SETTLE ISSUES.

9. If it appear to the Board at any time that the statements in the application, or answer, or reply do not sufficiently raise or disclose the issues of fact in dispute between the parties, it may direct them to prepare issues, and such issues shall, if the parties differ, be settled by the Board.

PRELIMINARY QUESTIONS OF LAW.

10. If it appear to the Board at any time that there is a question of law which it would be convenient to have decided before further proceeding with the case, it may direct such question to be raised for its information, either by special case or in such other manner as it may deem expedient, and the Board may, pending such decision, order the whole or any portion of the proceeding before the Board in such matter, to be stayed.

PRELIMINARY MEETING.

9. If it appear to the Board at any time before the hearing of the application that it would be advantageous to hold a preliminary meeting for the purpose of fixing or altering the place of hearing, determining the mode of conducting the inquiry, the admitting of certain facts or the proof of them by affidavit, or for any other purpose, the Board may hold such meeting upon such notice to the parties as it deems sufficient, and may thereupon make such order as it may deem expedient.

PRELIMINARY EXAMINATION WITH THE PARTIES.

12. The Board may, if it thinks fit, instead of holding the preliminary meeting, provided for in Rule 11, communicate with the parties direct, and may require answers to such inquiries as it may consider necessary.

PRODUCTION AND INSPECTION OF DOCUMENTS.

13. Either party shall be entitled, at any time, before or at hearing of the case, to give notice in writing to the other party in whose application, or answer, or reply reference was made to any document, to produce it for the inspection of the party giving such notice, or his solicitor, and to permit him to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put in such documents in evidence on his behalf in said proceedings, unless he satisfy the Board that he had sufficient cause for not complying with such notice.

NOTICE TO PRODUCE.

14. Either party may give to the other a notice in writing to produce such documents as relate to any matter in difference, (specifying the said documents) and which are in the possession or control of such other party; and if such notice be not complied with, secondary evidence of the contents of the said documents may be given by or on behalf of the party who gave such notice.

NOTICE TO ADMIT.

15. Either party may give to the other party a notice in writing to admit any documents, saving all just exceptions, and in case of neglect to admit, after such notice, the cost of proving such documents shall be paid by the party so neglecting or refusing, whatever the result of the application may be; unless, on the hearing, the Board certifies that the refusal to admit was reasonable; and no costs of proving any document shall be allowed, unless such notice be given, except where the omission to give the notice is, in the opinion of the Board, a saving of expense.

WITNESSES.

16. The attendance and examination of witnesses, the production and inspection of documents, shall be enforced in the same manner as is now enforced in a Superior Court of law; and the proceedings for that purpose shall be in the same form, *mutatis mutandis*, and they shall be sealed by the Secretary of the Board with the seal and may be served in any part of Canada. (Section 23.)

Witnesses shall be entitled, in the discretion of the Board, to be paid the fees and allowances prescribed by Schedule No. 4, annexed hereto.

THE HEARING.

17. The witnesses at the hearing shall be examined *viva voce*; but the Board may, at any time, for sufficient reason, order that any particular facts may be proved by affidavit, or that the affidavit of any witnesses may be read at the hearing on such conditions as it may think reasonable; or that any witnesses whose attendance ought, for some sufficient reason,

to be dispensed with, be examined before a Commissioner appointed by it for that purpose, who shall have authority to administer oaths, and before whom all parties shall attend. The evidence taken before such Commissioner shall be confined to the subject matter in question, and any objection to the admission of such evidence shall be noted by the Commissioner and dealt with by the Board at the hearing. Such notice of the time and place of examination as is prescribed in the order shall be given to the adverse party. All examinations taken in pursuance of any of the provisions of this Act, or of these rules, shall be returned to the Court; and the depositions certified under the hands of the person or persons taking the same may, without further proof, be used in evidence, saving all just exceptions. The Board may require further evidence to be given either *viva voce* or by affidavit, or by deposition, taken before a Commissioner or other person appointed by it for that purpose.

The Board may, in any case when deemed advisable, require written briefs to be submitted by the parties.

The hearing of the case, when once commenced, shall proceed, so far as in the judgment of the Board may be practicable, from day to day.

JUDGMENT OF THE BOARD.

13. After hearing the case the Board may dismiss the application, or make an order thereon in favour of the respondents, or reserve its decision, or (subject to the right of appeal in the Act mentioned) make such other order upon the application as may be warranted by the evidence and may seem to it just.

The Board may give verbally or in writing the reasons for its decisions. A copy of the order made thereon shall be mailed or delivered to the respective parties. It shall not be necessary to hold a court merely for the purpose of giving decisions.

Any decision or order made by the Board under this Act may be made an order of the Exchequer Court, or a rule, order, or decree of any Superior Court of any Province of Canada, and shall be enforced in like manner as any rule, order, or decree of such court. To make such decision or order a rule,

order or decree of such court, the usual practice and procedure of the court in such matters may be followed, or in lieu thereof the form prescribed in sub-section 2, section 35 of the Act.

The Board shall with respect to all matters necessary or proper for the due exercise of its jurisdiction under this Act, or otherwise for carrying this Act into effect, have all such powers, rights, and privileges as are vested in a Superior Court. (Section 23.)

ALTERATION OR RESCINDING OF ORDERS.

19. Any application to the Board to review, rescind, or vary any decision or order made by it shall be made within thirty days after the said decision or order shall have been communicated to the parties, unless the Board think fit to enlarge the time for making such application, or otherwise orders.

APPEAL.

20. If either party desire to appeal to the Supreme Court of Canada from the decision or order of the Board upon any question which, in the opinion of the Board, is a question of law, he shall give notice (c) thereof to the other party and to the Secretary, within fourteen days from the time when the decision or order appealed from was made, unless the Board allows further time, and shall in such notice state the grounds of the appeal. The granting of such leave shall be in the discretion of the Board.

For procedure upon such leave being obtained see section 44, sub-section 4, *et seq.* of the Act.

An appeal shall lie from the Board to the Supreme Court of Canada upon a question of jurisdiction; but such appeal shall not lie unless the same is allowed by a judge of the said Court upon application and hearing the parties and the Board.

The costs of such application shall be in the discretion of the judge.

INTERIM EX PARTE ORDERS.

21. Whenever the special circumstances of any case seem to so require, the Board may make an Interim *ex parte* Order

(c) For form of notice see form No. 5 in the schedule hereto.

requiring or forbidding anything to be done which the Board would be empowered upon application, notice and hearing to authorize, require or forbid. No such Interim Order shall, however, be made for a longer time than the Board may deem necessary to enable the matter to be heard and determined. (Section 38.)

AFFIDAVITS.

22. Affidavits of service according to the form No. 6 shall forthwith, after service, be filed with the Board in respect of all documents or notices required to be served under these rules: except when notice is given or served by the Secretary of the Board, in which case no affidavit of service shall be necessary.

All persons authorized to administer oaths to be used in any of the Superior Courts of any Province, may take affidavits to be used on any application to the Board.

Affidavits used before the Board, or in any proceeding under this Act, shall be filed with the Secretary of the Board at its office.

Where affidavits are made as to belief, the grounds upon which the same are based must be set forth.

COMPUTATION OF TIME.

23. In all cases in which any particular number of days, not expressed to be clear days, is prescribed by this Act, or by these rules, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas Day, or Good Friday, or a day appointed for a public fast or thanksgiving in the Dominion or any of the Provinces, in which case the time shall be reckoned exclusively of that day also.

ADJOURNMENT.

24. The Board may, from time to time, adjourn any proceedings before it.

AMENDMENT.

25. The Board may at any time allow any of the proceedings to be amended, or may order to be amended or struck out any matters which, in the opinion of the Board, may tend to pre-

judice, embarrass, or delay a fair hearing of the case upon its merits; and all such amendments shall be made as may, in the opinion of the Board, be necessary for the purpose of hearing and determining the real question in issue between the parties.

FORMAL OBJECTIONS.

26. No proceedings under this Act shall be defeated or affected by any technical objections or any objections based upon defects in form merely.

PRACTICE OF EXCHEQUER COURT WHEN APPLICABLE.

27. In any case not expressly provided for by this Act, or these rules, the general principles of practice in the Exchequer Court may be adopted and applied, at the discretion of the Board, to proceedings before it.

COSTS.

28. The costs of and incidental to any proceedings before the Board shall be in the discretion of the Board, and may be fixed in any case at a sum certain, or may be taxed. The Board may order by whom and to whom the same are to be paid, and by whom the same are to be taxed and allowed.

SCHEDULE No. 1.

(Forms of Application.)

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

APPLICATION No. (This No. is to be filled in by the Secretary on receipt.)

A. B. of C. D. hereby applies to the Board for an order under section 198 of The Railway Act, 1903, directing the Railway Company to provide and construct a suitable farm crossing where the Company's Railway intersects his farm in Lot Con. Tp.
County of Ontario, and states—

1. That he is the owner of the land, &c.

The said Company in answer to the said application states:—

1. That the said A. B. is not the owner, but merely, etc.
 2. That upon the acquisition of the right of way of the said Railway, A. B. was duly paid for and released, etc.
 3. That the said A. B. has other safe and convenient means, etc.
 4. That, etc.
- Dated, etc.

Endorsements.

The within answer is made by A. B. of
(state address and occupation) or by C. D.
of his solicitor.

Take notice that the within named Applicant is required to file with the Board of Railway Commissioners within four days from the service hereof, his reply to the within answer.

SCHEDULE No. 3.

(Reply).

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

In the matter of the application of A. B. against the
Company.

The said A. B., in reply to the answer of the said Company states that:—

- 1.
 2. And the said A. B. admits that
-

Dated thisday ofA.D. 19....
(Signed) Q.

SCHEDULE No. 4.

(Fees and Allowances to Witnesses).

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

To witnesses residing within three miles of the Court-
room, per diem, (not including ferry and meals).. \$ 1.00

Barristers, attorneys, and physicians, when called upon to give evidence in consequence of any professional services rendered by them, or to give professional opinion, per diem	5.00
Engineers, surveyors, and architects, when called upon to give evidence of any professional services rendered by them, and to give evidence depending upon their skill and judgment per diem.....	5.00

If the witnesses attend in one case only, they will be entitled to the full allowance. If they attend in more than one case, they will be entitled to a proportionate part in each case only.

When witnesses travel over three miles they shall be allowed expenses according to the sum reasonably and actually paid, which in no case shall exceed twenty cents per mile one way.

SCHEDULE No. 5.

(Notice of Appeal.)

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

In the matter of the application No. _____, of A. B.
for an Order under section 198 of the Railway Act, 1903,
authorizing the _____ Railway, etc., etc.

To the Board of Railway Commissioners,
and

To

The above named Applicant (or Respondent, as the case may be).

Take notice that the _____ Company will apply to the Board on the _____ day of _____, (not exceeding 14 days from the date thereof) for leave to appeal to the Supreme Court of Canada from the Order of the Board, dated the _____ day of _____, in the matter of the above application authorizing the expropriation of certain lands referred to in said Order, and directing that compensation or damages to be awarded to the owners of said lands, or persons interested therein, shall be ascertained, as and from the date of the application (or such other time as may be named in the Order).

The grounds of appeal are that as a matter of law, the awarding of such compensation or damages should be ascer-

tained and determined from the date of the deposit of plan, profile, etc., as provided under section 153 of the Act, and not from the time stated in the Order.

Dated this day of

Signed,

Solicitor, etc.

SCHEDULE No. 6.

(Form of Affidavit of Service.)

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

In the matter of the application, No. , of A. B. for an Order under section 198 of The Railway Act, 1903, directing Railway Company to provide a farm crossing.

I, of the City of Ottawa, etc., make oath and say:—

1. That I am a member, etc.

2. That I did on 19 , serve the (C.P.) Railway Company above named, with a true copy of the (application) of the said (A. B.) in this matter by delivering the same to (C. D.) the (Secretary) of the said Company (or to E. F. the Ass't to the Gen. Mgr.) of the Company, being an adult person in the employ of the Company at the head office of the Company in (Montreal), see section 28 (a), which said copy was endorsed with the following notice, viz.:—

(Copy exactly)

Sworn, etc.

REQUIREMENTS ON APPLICATION HAVING REFERENCE TO PLANS.

No. 1.—GENERAL LOCATION OF RAILWAY—Sections 122-124.

(a) Send to Secretary of the Department of Railways and Canals: 3 copies of *map* showing the general location of the proposed line of railway, the termini and the principal towns and places through which the railway is to pass, giving the names thereof, the railways, navigable streams and tide-water, if any, to be crossed by the railway, and

such as may be within a radius of thirty miles of the proposed railway, and generally the physical features of the country through which the railway is to be constructed.

1st copy to be examined and approved by the Minister and filed in the Department of Railways and Canals.

2nd copy to be approved by Minister for filing by the Company with the Board.

3rd copy to be approved by Minister for the Company.

Scale of Map—not less than 6 miles to the inch.

(b) Upon approved general location map being filed by the Company with the Board, send to the Secretary of the Board three sets of plan prepared exactly in accordance with the “general notes” hereunder, as follows:—

1st set—	$\left\{ \begin{array}{l} 1 \text{ plan.} \\ 1 \text{ profile.} \\ 1 \text{ book of reference.} \end{array} \right.$	$\left\{ \begin{array}{l} \text{To be examined, sanctioned and deposited with the Board.} \end{array} \right.$
2nd set—Same as 1st.	$\left\{ \begin{array}{l} \text{To be examined, certified and returned for registration.} \end{array} \right.$	
3rd set—Same as 1st.	$\left\{ \begin{array}{l} \text{To be certified and returned to Company.} \end{array} \right.$	

Scale—Plans—400 feet to the inch.

(N.B.—In prairie country, scale may be 1,000 ft. to the inch.)

Profiles. $\left\{ \begin{array}{l} \text{Horizontal, 400 feet.} \\ \text{Vertical, 20 feet.} \end{array} \right.$

No. 2.—TO ALTER LOCATION OF LINE PREVIOUSLY SANCTIONED OR COMPLETED.—Section 130.

Send to the Secretary of the Board three sets of plans, profiles and books of reference as required in No. 1 (b).

(N.B.—The plans and profiles so submitted will be required to shew the original location, grades and curves, and the changes desired or necessitated.)

Scale—Same as No. 1 (b).

No. 3.—PLANS OF COMPLETED RAILWAY.—Section 128.

Send to the Secretary of the Board within six months after completion three sets of plans and profiles of the completed road.

1st set to be filed with the Board.

2nd set to be certified and returned to the Company.

3rd set for registration purposes.

Scale—Same as No. 1 (b).

No. 4.—TO TAKE ADDITIONAL LANDS FOR STATIONS, SNOW PROTECTION, ETC.— Section 139.

Send to the Secretary of the Board three sets of plans and documents as follows:—

1st set—	$\left\{ \begin{array}{l} 1 \text{ application sworn to by} \\ \text{officers required to sign} \\ \text{and certify plans. See} \\ \text{“General Notes.”} \\ 1 \text{ plan, 1 profile.} \\ 1 \text{ book of reference.} \end{array} \right\}$	$\left\{ \begin{array}{l} \text{To be examined} \\ \text{and certified and} \\ \text{deposited with the} \\ \text{Board.} \end{array} \right\}$
----------	---	---

2nd set—Same as 1st...	$\left\{ \begin{array}{l} \text{For certificate and return for} \\ \text{registration with duplicate au-} \\ \text{thority.} \end{array} \right\}$
------------------------	--

3rd set—Same as 1st...	$\left\{ \begin{array}{l} \text{For certificate and return} \\ \text{to company, with copy of au-} \\ \text{thority.} \end{array} \right\}$
------------------------	---

Scale—Same as No. 1 (b).

N.B.—Ten days' notice of application must be given by the applicant Company to the owner or possessor of the property, and copies of such notice with affidavits of service thereof must be furnished to the Board on the application.

No. 5.—BRANCH LINES, not exceeding six miles.—Section 175.

(a) 1 plan, profile and book of reference same as No. 1 (b) to be deposited in Registry Office.

Upon such registration 4 weeks public notice of application to the Board to be given.

Send to the Secretary of the Board an application with copies of the plan, profile and book of reference certified by the Registrar as a duplicate of those so deposited in the Registry Office.

A certified copy of the Order authorizing the construction of the Branch lines to be registered together with any papers and plans showing changes directed by the Board.

A map showing the adjacent country, neighbouring lines, etc., must be sent to the Secretary of the Board with the application.

Proof of registration and of public notice having been duly given will be required upon the application.

Scale—Same as No. 1 (*b*).

No. 6.—RAILWAY CROSSINGS OR JUNCTIONS.—Section 177.

Send to the Secretary of the Board with an application three sets of plan of both roads at point of crossing.

Scale—Plan—100 feet to the inch.

Also three sets of plan and profile of both roads on either side of the proposed crossing for a distance of two miles,

Scale—Plan—400 feet to the inch.

Profile { 400 feet to inch horizontal.
20 feet to inch vertical.

1st set for approval by and filing with the Board;

2nd and 3rd sets to the certified and furnished to the respective companies concerned, with certified copy of order.

The applicant Company must give ten days' notice of application to the Company whose lines are to be crossed or joined, and shall serve with such notice a copy of all plans and profiles and a copy of the application. Upon completion of work application must be made to the Board for leave to operate.

No. 7.—HIGHWAY CROSSINGS.—Sections 184 to 191.

Send to the Secretary of the Board with an application three sets of plans and profiles of the crossings.

Scale—Plan—100 feet to the inch.

Profile { 20 feet to inch vertical.
100 feet to inch horizontal.

1st set for approval by and filing with the Board;

2nd and 3rd sets to be furnished to the respective parties concerned, with a certified copy of the order approving the same.

The plan and profile shall show at least 1-2 a mile of the railway and 200 feet of the highway on each side of the crossing.

The applicant must give ten days' notice of application to the opposite party and with such notice shall serve a copy of the plan and profile and of the application.

No. 8.—CROSSINGS WITH WIRES FOR TELEGRAPHS, TELEPHONE AND POWERS.—Section 194.

Send to the Secretary of the Board with the application a plan and profile in duplicate. Profile must show the distance between the different lines of wire.

A copy of plan and profile to be sent to the Railway Company with notice of application.

No. 9.—CROSSINGS AND WORKS UPON NAVIGABLE WATERS, BEACHES, ETC.—Section 182.

Upon site and general plans being approved by the Governor in Council, send to the Secretary of the Board:—
Certified copy of Order in Council with the plans and description approved thereby—1 application and 2 sets of detail, plans, profiles, drawings and specifications.

1st set for filing with Board.

2nd set to be certified and returned to Company with certified copy of order.

Upon completion of work application must be made to the Board for leave to operate.

No. 10.—BRIDGES, TUNNELS, VIADUCTS, TRESTLES, ETC., over 18 feet span.—Section 203.

(a) Must be built in accordance with standard specifications and plans, approved of by the Board.

(b) Or detail plans, profiles, drawings, and specifications, which may be blue, white or photographic prints, must be sent to the Secretary of the Board for approval, etc., as in No. 8.

No. 11.—STATIONS.—Section 204.

Send to the Secretary of the Board:—

2 sets of detail plans, profiles, drawings and specifications, with an application for approval.

1st set for filing with the Board.

2nd set to be certified and returned to Company with certified copy of order of approval.

GENERAL NOTES.

Plans (for Nos. 1 (*b*) to 5) must show the right of way, with lengths of sections in miles, the names of the terminal points, the station grounds, the property lines, owners' names, the areas and length and width of lands proposed to be taken, in figures (every change of width being given) the curves and the bearings, also all open drains, water courses, highways, and railways proposed to be crossed or affected.

Profiles shall show the grades, curves, highway and railway crossings, open drains and water courses, and may be endorsed on the plan itself.

Books of reference shall describe the portion of land proposed to be taken in each lot to be traversed, giving numbers of the lots, and the area, length, and width of the portion thereof proposed to be taken and names of owners and occupiers so far as can be ascertained.

All plans, profiles and books of reference must be dated and must be certified and signed by the President or Vice-President or General Manager, and also by the Engineer of the Company.

The plan and profile to be retained by the Board must be on *linen*, the copies to be returned may be either white, blue, or photographic prints.

All profiles shall be based, where possible, upon sea level datum.

All books of reference must be made on good thick paper and in the form of a book with a suitable paper cover. The size of such books when closed shall be as near as possible to 7 1-2 inches by 7 inches.

Book of reference may be endorsed on the plan.

Form of book of reference required.

	Railway Company.	-
Division or Province		Branch.

Book of Reference to accompany Location Plan showing Lands required for railway purposes.

INTERLOCKING SYSTEM.

RULES FOR SIGNALS AND SPEED OF TRAINS WHERE ONE STEAM RAILWAY CROSSES ANOTHER AT RAIL LEVEL.

When the signal on distant semaphore post indicates *caution*, a train passing it must be under *full control* and come to a *full stop* before reaching the home post.

When the signal on the home post indicates *danger*, it must *not be passed*.

When the signals on the distant and home posts indicate *safety*, the train can proceed.

When clear signals are shown the speed of passenger trains must be reduced to *twenty* miles and freight trains to *ten* miles per hour, until the entire train has passed the crossing.

GENERAL REQUIREMENTS.

Applicable to Steam Railways for Interlocking, Derailing and Signals System at Crossings at Rail Level and at Junctions.

The plan and construction of interlocking, signalling and derailing system to be used at rail level crossings and junctions of one railway by another must be arranged to conform to the following general rules:—

1. The normal position of all signals must indicate danger, derail points open and the interlocking so arranged that it will be impossible for the operator to give conflicting signals.

2. The derail points must be placed not less than 500 feet from point of intersection of the crossing of junction tracks, unless in special cases in which the Board authorizes in writing a less distance.

3. On side tracks the position of derail points may be located so as to best accommodate the traffic, and provide the same measure of safety indicated in foregoing rules.

4. On single track railways, derail points, when practicable, should be on inside of curve and on double track railways the derail points should be in outside rail of both tracks.

5. On double track railways back-up derails will be necessary.

6. Home signal posts must be 50 feet beyond point of derail, and the distance between home and distant signals must be not less than 1,200 feet. Signal post should be placed on engineman's side of track it governs.

7. Guard-rails should be laid on outside of rail in which the derail is placed and commence at least 6 feet toward home signal from point of derail, extending from thence toward crossing, parallel with and 9 inches distant from track rail, for 400 feet.

8. In case there are crossovers, turnouts, or other connecting tracks involved in the general system, the movements of cars and trains upon which present an element of danger, which danger will be enhanced by the passage of trains on main tracks over crossings without stopping, and consequently at higher speed than would be the case without the permit sought, then and in all such cases, whether such enhanced danger be of collision between cars and trains of the same railway, or between cars or trains of different railways, it will be necessary, in addition to the protection of the main crossing, to provide by proper appliances against any such increased collateral dangers in the same complete manner as is required in the case of the main crossing.

9. The arms and back lights of all signals should be visible to the signal man in the tower. If from any cause the arm or light cannot be placed so as to be seen by the signal man, a repeater or indicator should be provided in the tower.

10. Application for inspection of interlocking plant must be made to the Board accompanied by a plain diagram, showing location of crossing and position of all main tracks, sidings, switches, turnouts, etc.

The several tracks must be indicated by letters or figures, and reference made to each, explaining the manner of its use.

The rate of grade on each main track must be shown, together with numbers of signals, derails, locks, etc., corresponding to levers in tower.

It is intended herein to state general rules, which will govern the construction of any proposed system of interlocking. The traffic to be done, relative position and operation of intersecting lines, may require safeguards not mentioned herein.

The system of dealing, signalling and interlocking must be connected and worked and be complete in each particular before the Board will grant an order authorizing the operation of such interlocking, derailing and signal system or the crossing by the railway ordered to put on the system.

General Requirements for Interlocking at Drawbridges.

Interlocking, signalling, and derailing systems to be used at drawbridges must be arranged to conform to the following general rules:—

1. The normal position of all signals must indicate danger, derail points open and the interlocking so arranged that it will be impossible for the operator to open the draw until signals and derails are set against the approaching train movement.

2. Where the grade is practically level the derailing points shall be located not less than 500 feet from the ends of the bridge, but, in case of a descending grade towards the bridge, the derailing point must be located at such distance from the bridge as to give the same measure of protection that is required for a level approach.

3. On single track railways, derail points when practicable, should be on the inside of curve, and on double track railways, the derail points should be in outside rails of both tracks.

4. On double track railways back-up derails will be necessary.

5. Home signal posts must, when practicable, be located on the engineman's side of the track they govern, and should be not less than fifty (50) feet nor more than two hundred (200) feet in advance of the point they govern, the distant signals should be located not less than twelve hundred (1,200) feet in advance of the home signal, with which it operates and on the same side of the track. The distance signal should be distinguished by a notch cut in the end of the semaphore arm.

6. The arms and back-lights of all signals should be visible to the signal man in the tower. If from any cause, the arm or light of any signal cannot be placed so as to be seen by the signal man, a repeater or indicator should be provided in the tower.

7. Guard rails should be laid on outside of rail in which the derail is placed, and, commencing at least 6 feet in advance of derail, should extend thence toward the end of bridge, parallel with and 9 inches from track rail, for not less than 400 feet.

8. Application for inspection must be made same as for railway crossings.

FORM OF NOTICE OF EXPROPRIATION AND CERTIFICATE SECTIONS 154 AND 155.

NOTICE.

To A.B. of the _____ of _____

TAKE NOTICE that the C. D. Railway Company require from you for the purposes of its Railway all your estate and interest in the land hereinafter described and will take, under the provisions of the Railway Act, 1903, all and singular that certain parcel or tract of land and premises (*here follows description*), as shewn coloured red on attached sketch.

AND TAKE NOTICE that the power intended to be exercised by the said Railway Company with regard to the land above described is the taking of the said land in fee simple for the purposes of constructing the said Railway and works thereon and operating the same.

AND FURTHER TAKE NOTICE that the said, the C. D. Railway Company, are ready and willing and hereby offer to pay the sum of dollars as compensation for the land above described and for any damages caused by the exercise of their powers thereon.

Solicitor for the C. D. Railway Company.

DATED at _____, this
day of _____, A.D. 190 .

I, E. F., of the of in the County of
 , Land Surveyor or Civil Engineer (*as the case may be*)
do hereby certify:

1. THAT I am disinterested in the matter herein referred to.

2. THAT the land described in the attached Notice and shewn
on the plan deposited with the Registrar of Deeds for the
County of , is required for the C. D. Railway.

3. THAT I know the said land and the amount of damage
likely to arise from the exercise of the powers mentioned in the
attached Notice and that the sum of dollars offered
by the C. D. Railway Company is a fair compensation for the
land and damages aforesaid.

DATED at , this day of A.D. 190 .

Land Surveyor
or Civil Engineer.



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